

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

The Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2005-1 CRB DTRA
(Webcasting Rate Adjustment Proceeding)	

Volume 35

Room LM-414
Library of Congress
First Street and
Independence Avenue, S.E.
Washington, D.C. 20540

Wednesday,
November 6, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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P-R-O-C-E-E-D-I-N-G-S

Time: 9:32 a.m.

CHIEF JUDGE SLEDGE: Good morning.

We will return to order. Counsel, you are at the podium.

MR. HANDZO: I am, Your Honor. I have one preliminary matter that I would like to raise with the Board.

CHIEF JUDGE SLEDGE: Yes?

MR. HANDZO: That is a question about the Board's schedule. The parties wanted to request of the Board that we not be in trial during the week of Thanksgiving. I assume that we will get through DiMA's case this week, the Broadcasters' case next week, and then we are into the week of Thanksgiving.

I think last time around the Board took the week off during the Fourth of July holiday. We, I think, request the same thing this time around for Thanksgiving, partly to accommodate the vacation plans of the Council, but also, I suspect, because it is going to be

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1 very hard for us to get witnesses here during
2 that week. But I don't know if that is an
3 issue that the Board had given any thought to
4 at this point.

5 CHIEF JUDGE SLEDGE: It is not.
6 We are presently scheduled to be here the full
7 week of Thanksgiving. So anything that you
8 all want to do to change that, please file
9 that in writing.

10 MR. HANDZO: We will do that.

11 JUDGE ROBERTS: Mr. Handzo, we
12 were planning to hand out Swanson turkey
13 dinners on Thanksgiving, if that helps at all.

14 MR. HANDZO: To be honest, it
15 doesn't help much.

16 JUDGE ROBERTS: Yes, I didn't
17 think so.

18 CHIEF JUDGE SLEDGE: One other
19 point on that. Prior to us agreeing to your
20 request on moving these hearings, we have
21 scheduled a two-hour hearing Wednesday
22 afternoon beginning at 1:30. So Wednesday

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1 afternoon we will have to be in recess from
2 1:30 to 3:30, which I realize from getting
3 your witness list, that that will be probably
4 the worst day of the week for you of this
5 week, but that's been set a good long while in
6 a DAT 's claim hearing that we thought was
7 going to be in third week of testimony and,
8 therefore, very little interference with you,
9 but then you changed us on that. So it being
10 in the first week is more problematic, I'm
11 sure.

12 MR. HANDZO: One other question,
13 Your Honor. Are we following the same
14 schedule this time around in terms of going
15 four days a week and taking Friday off?

16 CHIEF JUDGE SLEDGE: Yes.

17 MR. HANDZO: Thank you.

18 CHIEF JUDGE SLEDGE: Really, that
19 seems unfortunate as far as progress, but I
20 know it is -- from my perspective, it is just
21 imperative to have that day to catch up, and
22 I suspect it is probably very useful to you,

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1 too.

2 MR. HANDZO: Yes.

3 MR. STEINTHAL: Your Honor, at
4 this time just on the scheduling, the
5 Thanksgiving week for me is a little bit
6 different than everybody else. I understand
7 the issue with respect to scheduling of the
8 witnesses.

9 I am currently -- There is another
10 case about to go to trial in the U.K., and I
11 am trying to balance a proceeding before the
12 U.K. Copyright Tribunal which was suddenly
13 adjourned when four of the seven parties
14 settled, but that is -- There is a lot of
15 pressure from the Tribunal there as to what is
16 happening here, and what I have told the
17 Tribunal there is, if Thanksgiving week is
18 off, and if we don't settle -- and I will
19 report to the Board, there still are
20 discussions, and they may or may not bear
21 fruit, but it is not as if -- We did close
22 ourselves in a room on the day that we were

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1 ordered to do so, and have had a number of
2 discussions since then. We are just not at
3 the point where we can announce anything. So
4 I won't. But the U.K. Tribunal matter does
5 cause a problem for me, in that I have got to
6 report to the Tribunal, because I told the
7 Tribunal hearing that this request was going
8 to be made, that what I would be prepared to
9 do is be here this week, allow myself to start
10 the trial in the U.K. next week when the
11 broadcasters and small webcasters are putting
12 their witnesses on, and Mr. Larson can cover.

13 Then thinking that Thanksgiving
14 week would be an off week based on what all
15 the parties had talked about, I didn't commit
16 to the Tribunal in the U.K. I said that we
17 would be raising this with you this morning so
18 that, if we were going to get Thanksgiving
19 week off, I could report to the Chairman of
20 the Tribunal there that I would have a two-
21 week period starting next week through
22 Thanksgiving week where I didn't need to be

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1 here, and then I would come back from the U.K.
2 and be here for the week after Thanksgiving
3 when SoundExchange puts its witnesses on.

4 So I've got that extra
5 complicating factor, I'm afraid, and to the
6 extent we can get some feedback from the
7 panel, the sooner the better.

8 CHIEF JUDGE SLEDGE: We will do
9 that. We will give you an answer as quickly
10 as possible. Frankly, one of the big factors
11 we will be considering is how much credibility
12 we have in your assurance that we will be
13 through with all testimony by the end of
14 November and how much assurance we are
15 comfortable with that so that we can begin the
16 final stages and getting the matters from you
17 in a timely way in December so that we have
18 everything completed and begin writing by mid-
19 December will affect how we do.

20 That's a tight schedule. Frankly,
21 we don't know how we can get our current
22 matters pressing on us done if we don't start

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1 writing in December.

2 MR. STEINTHAL: I think we are
3 pretty confident, and I am prepared to say
4 this -- I know people are going to chuckle,
5 but we are pretty confident that we are going
6 to get through the witnesses on the service
7 side within the first two weeks. So that if
8 we do take Thanksgiving off, we will come
9 right back with the SoundExchange case right
10 after Thanksgiving.

11 CHIEF JUDGE SLEDGE: That doesn't
12 meet the goal that I just outlined.

13 MR. HANDZO: Well, we will take a
14 look at the schedule, Your Honor, and see what
15 we can do to meet that schedule.

16 CHIEF JUDGE SLEDGE: I know you
17 all will want a fair amount of time in
18 preparing your proposed findings and
19 conclusions, and I know that is very important
20 to us, and that will be what we need to start
21 writing.

22 MR. STEINTHAL: Some of that can

1 be done while we are in hiatus, too. We don't
2 have to wait until all the evidence is in to
3 be drafting, when we know that 80 percent of
4 the record is already in.

5 MR. HANDZO: I will say, I don't
6 think that -- The last day of the trial is not
7 going to be when we start writing our findings
8 of facts. I don't think that is going to
9 affect when we can get those to you, if that
10 is sort of the operative date that we are
11 driving off of.

12 CHIEF JUDGE SLEDGE: But also
13 think about in this discussion that we are now
14 starting -- what? -- two to three weeks after
15 we had expected to start. So that doesn't
16 leave us much leeway or much flexibility.

17 MR. JOSEPH: Your Honor, for
18 scheduling purposes, on Wednesday, as I think
19 was indicated in the letter, we had planned to
20 put on Professor Jaffe. That is the one day
21 that, as far as we can tell, he is available.
22 I just wanted to check for scheduling purposes

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1 if the court would be willing to run a little
2 bit late on that day, if we need to, to get
3 him done.

4 CHIEF JUDGE SLEDGE: Yes.

5 MR. JOSEPH: Thank you.

6 CHIEF JUDGE SLEDGE: I guess the
7 operative question is "little."

8 MR. JOSEPH: Excuse me.

9 CHIEF JUDGE SLEDGE: The operative
10 question would be "a little."

11 MR. JOSEPH: Understood.

12 MR. LARSON: Your Honor, DiMA
13 calls as its first witness Christine Winston.
14 WHEREUPON,

15 CHRISTINE WINSTON
16 was called as a witness by counsel for Digital
17 Media Assoc (DiMA), and having first been duly
18 sworn, assumed the witness stand, was examined
19 and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. LARSON:

22 Q Ms. Winston, welcome back. Could

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1 you tell us before we get into the details
2 your current title at AOL?

3 A Yes. I am Vice President of
4 Finance, responsible for metrics and strategic
5 analysis.

6 Q And is that a change from when you
7 were here before and testified?

8 A It is a change in my title. I
9 have been promoted, but my responsibilities
10 remain largely the same.

11 Q Okay. And can you just remind us
12 of what your responsibilities are in your
13 position?

14 A Sure. I am responsible for
15 analysis and reporting on all of the metrics
16 for AOL services, including music and radio,
17 as well as in strategic analysis and
18 forecasting for the business.

19 Q And does your position still
20 entail finances and accounting related to
21 royalties that are paid?

22 A Yes, it does.

1 Q Now if I could direct your
2 attention to your statement there in front of
3 you, I see the first section of your statement
4 is titled "In-stream Audio Advertisements in
5 AOL's Broadband Radio Products."

6 A Yes.

7 Q Can you just again refresh our
8 recollection as to what the AOL broadband
9 radio product is?

10 A Yes. AOL offered to its broadband
11 subscribers a higher fidelity product that,
12 for a period of time, did not include in-
13 stream advertisements and included some
14 additional programming from our partner, XM.

15 Q And just generally, how was that
16 product made available to users?

17 A It is made available through the -
18 - was made available through the AOL client
19 software to subscribers.

20 Q When you say through the AOL
21 client software?

22 A It is a specific program that

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1 allowed people to access their AOL e-mail and
2 various other products, with virus protection
3 and things of that nature.

4 Q Now I understand then from what
5 you have said that there is a change related
6 to the advertisements in this product?

7 A Yes. As I indicated when I was
8 here last, we have added in-stream audio
9 advertisements to that product. They were
10 added in the middle of June, on the 19th,
11 which I think was just after or during my last
12 testimony here. So the broadband radio
13 product now carries advertisements, just as
14 our free radio product did.

15 Q Were you involved with the
16 decision to place advertising in that product?

17 A Yes. It was a very simply made
18 decision. We had come to a point where our
19 sell through rates on the existing radio
20 products that carried audio ads were trending
21 upward of 80 percent. So as marketplace
22 demand started to fill out the inventory we

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1 already had, we added more inventory by
2 placing ads in the broadband product.

3 Q Can you just tell us generally,
4 why is this change part of your rebuttal
5 testimony here?

6 A It is part of my testimony,
7 because in Professor Brynjolfsson's statement
8 and his analysis and findings, he mentions
9 that we did not have advertising in this
10 product and that we were in some way
11 intentionally leaving money on the table by
12 making this product ad-free, when in reality
13 we were never sold out on the advertisements
14 that we had in the existing products that
15 carried audio advertising.

16 When we did get to a closer to
17 sold out situation on that product, we added
18 inventory to the free product or, in this
19 case, we added the advertising to the
20 broadband product.

21 Q Now let me just point your
22 attention. In the bottom of Paragraph 3, you

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1 talk about the task of determining what
2 allocated portion -- what that allocated
3 portion would actually be when users pay a
4 single price for broadband Internet access.

5 A Sure.

6 Q Can you just explain to us what
7 you were talking about?

8 A Yes. There has been some
9 discussion in this proceeding of whether radio
10 added some kind of benefit to consumers who
11 were paying AOL a monthly fee for their
12 broadband subscription, and there really is no
13 way, when we have a bundled product that
14 includes many things such as continued access
15 to your AOL e-mail and virus protection and
16 SPAM protection and other content and
17 programming, to pinpoint an exact amount of
18 that subscription fee that one might attribute
19 to radio, since, first, not every subscriber
20 uses radio and, even if those who do, with a
21 bundled price plan that doesn't offer things
22 a la carte for subscription, it is very

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1 difficult to determine what the value for that
2 might be.

3 I had in my original statement
4 suggested a method for imputing a means by
5 which to pay a revenue share to the labels for
6 the broadband product, which was to look at
7 the total listening hours on the broadband
8 product relative to the total listening hours
9 on the narrow band product, and look at the
10 revenue on the narrow band product and pay a
11 pro rata revenue share based on the total
12 listening hours between the two. So --

13 Q Let me just jump in there for a
14 second, just so we are all clear, because it
15 has been a while since we have been here.

16 When you mentioned the narrow band
17 product, can you just tell us what that is?

18 A That would be the product that
19 carried audio advertising, has always carried
20 audio advertising since we started working
21 with Ronning Lipset. That was both available
22 for free on the Web to a non-AOL subscriber,

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1 as well as to a subscriber for dial-up access.

2 Q So again, the idea before was to
3 do what again, when you talk about imputing --

4 A To attribute -- Should we look for
5 a revenue share inclusion in this proceeding,
6 that we might impute the revenue that would
7 have been earned on the broadband product, had
8 we had audio ads, based on the total listening
9 hours in broadband, the ads that would have
10 been served, and apply to those a rate based
11 on what we earned in the products that did
12 contain advertising.

13 Q Is a calculation like that
14 necessary now for you?

15 A It isn't necessary now that we
16 have added audio advertising to that product,
17 because we obviously are running ads there.

18 Q Okay. You list some figures. I
19 won't ask you to state them out loud, so we
20 can stay on the public record. But in
21 paragraph 3 you list some figures for your
22 sales of in-stream advertising revenues.

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1 A Yes.

2 Q Are those accurate to the best of
3 your knowledge?

4 A Yes.

5 Q Now are there any other planned
6 changes or recent changes to the AOL broadband
7 radio product?

8 A There have been some very major
9 changes to AOL's overall business in the past
10 few months that you may have read about in the
11 press, and they do have implications for
12 radio, although radio was not part of, nor was
13 it discussed at any point in those strategic
14 discussions.

15 So AOL has elected to no longer
16 sell subscription products to users that have
17 their own broadband connection. So the
18 business that we were in of both selling dial-
19 up access as well as a subscription product
20 for people who had their own access through a
21 cable company or through a DSL provider -- we
22 are exiting that business, and users can now

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1 retain their AOL e-mail address and continue
2 to use our software and products and get to
3 all of our content without paying a fee, if
4 they have their own dial-up connection.

5 In doing so, AOL is forfeiting
6 basically that piece of our subscription
7 business, but working on building a broader
8 advertising business.

9 The implications for radio are
10 simply that we had a product that had a few
11 differences in this broadband radio product,
12 and those users are now no longer going to be
13 paying us a subscription fee. So we have
14 determined that we will make the broadband
15 fidelity, sound fidelity, available to
16 everyone who uses our radio product, whether
17 they are a paying dial-up subscriber or a free
18 user.

19 Q So if I can just break this down
20 so we make sure we are clear. Prior to this
21 recent change, users would have an broadband
22 Internet access subscription, and then they

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1 would also have a subscription to these AOL
2 products, including radio?

3 A Correct.

4 Q Okay. And now that part of the
5 package with the AOL products is now being
6 offered for free?

7 A Right.

8 Q Now does this have any
9 implications for the revenue issues that we
10 were just speaking about a few minutes ago?

11 A It doesn't, in that we had already
12 added the in-stream advertising. So, really,
13 the only change that this makes is that we are
14 offering the broadband sound quality of
15 fidelity which had previously been different
16 between the broadband product and the narrow
17 band or free product, which had streamed at
18 a lower fidelity.

19 Q And will there be subscription
20 revenues to have to allocate, as we were
21 discussing before?

22 A No, because we won't be in that

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1 business. the only subscriptions that people
2 will be buying from AOL will be for dial-up
3 access to the Internet.

4 Q Now if I could direct your
5 attention to Paragraph 5(b) -- well, first at
6 the beginning of Paragraph 5 you say that
7 these changes have a number of other
8 implications with respect to your testimony.

9 A Yes.

10 Q And in 5(b) you discuss again
11 Professor Brynjolfsson's testimony, if you
12 could just take a look at that. Could you
13 just tell me -- or tell the court what your
14 point there in 5(b) was that you were getting
15 at? Take a moment.

16 A Sure. So my point there is that
17 Professor Brynjolfsson argues that we are
18 either intentionally or artificially deflating
19 our revenue on the radio product. My position
20 is that we have never been in a sold out
21 situation. He would be accurate if we had
22 been in a sold out situation with our audio

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1 advertisements, but we were not; and as we got
2 closer to that, we continued to add inventory
3 to keep pace with marketplace demand, and we
4 did that by adding additional spots per hour,
5 and we have done that now by adding the
6 advertisements into the broadband radio
7 product. So the assertion is just simply not
8 true.

9 Q Now in Paragraph (c) you make
10 another point or a similar point with respect
11 to your XM radio stations.

12 A Yes. So as I believe you know, we
13 have a partnership with XM where we offer XM
14 radio stations on our products in addition to
15 our own programmed radio stations. Again, if
16 we were in a sold out situation, the fact that
17 there are no advertisements in the XM stations
18 might be leaving money on the table. However,
19 we are on average about 70 percent sold out
20 today, and in the last month that I saw in
21 August of '06, 50 percent sold out.

22 So if we were to add

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1 advertisements into the XM stations, we would
2 simply be moving sold advertisements from one
3 station to another and not actually making
4 more money, because the demand isn't there to
5 warrant having advertisements.

6 Q Okay. Let's move on to the next
7 section, page 4. There is a section called
8 Brynjolfsson's Use of AOL Holding Analysis.
9 Can you just refresh our recollection on what
10 this document was, the holding analysis?

11 A In February of 2005, I prepared
12 what I've called holding analysis for Eric
13 Ronning and Andy Lipset.

14 Q Who are they?

15 A They are the principals in the ad
16 rep'ing firm that represents AOL and Yahoo!
17 and, I believe, also MSN and Live365 for sales
18 of audio advertisements, and they sell us as
19 a network.

20 At that time, we were talking
21 about whether advertisements should be added
22 into the broadband product, and I looked at

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1 what the opportunity would be in a growing
2 marketplace demand scenario. So it was a
3 holding analysis assuming aggressive usage
4 increases, 100 percent sell-through, and
5 regular dollar CPM increases every year over
6 the course of four years.

7 It was not intended ever to be a
8 forecaster projection of what we would make.
9 It was intended to be a look at what the
10 potential might be of certain marketplace
11 situations came to bear, and if we sold all of
12 those advertisements.

13 The assumptions that I made there
14 were wholly uninformed by any feedback from
15 Eric and Andy. I sent that document to them
16 without their having given me guidance. So
17 the fact that I was assuming an increase of a
18 dollar CPM every year was simply a simple
19 assumption for somebody to react to, assuming
20 that marketplace demand would go up.

21 Q Let's just talk about some of
22 these details, and I would direct your

1 attention to Paragraph 8 of your statement.
2 I just want to take these points one at a time
3 that you just mentioned quickly.

4 In 8(a) you talk about the sell-
5 out rates.

6 A Yes.

7 Q That was a part of this document.
8 Can you just tell us again specifically what
9 the assumption was in this document?

10 A The assumption was that we were
11 100 percent sold out in the narrow band
12 product and, therefore, that ads would even be
13 sold at all in the broadband product, which
14 has not come to fruition, and where we have
15 come close, we have simply added inventory.

16 Q And Paragraph (b) talks about the
17 CPM figures that were assumed for purposes of
18 this calculation. Tell us --

19 A So this assumed that in 2006 we
20 would be earning \$4.00 CPM versus the \$3.00 we
21 were earning in 2005 and that it ramped up a
22 dollar each year over the course of four

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1 years. The \$4.00 assumption for 2006 has not
2 come to fruition. I understand that we are
3 still selling at around a \$3.00 CPM.

4 Q And then in (c) you mention
5 assumptions about streaming hours that were
6 included in the document.

7 A It assumed very aggressive usage.
8 Based on our current models and actual usage
9 through September of this year, our actual
10 usage will probably come in -- This was done
11 when I only had August numbers. I now have
12 September numbers. It is probably going to
13 come in around 60 percent of that forecast.

14 So the usage is much lower, and
15 our current forecast for 2007, based on where
16 we are today, is about half of what was in
17 that document.

18 Q Okay. And then point (d) you
19 mention that it assumes a certain -- or has a
20 certain assumption about the number of ads
21 served to listeners per hour.

22 A At that time we didn't have a lot

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1 of historicals. We had just started surveying
2 audio ads and working with Ronning Lipset, and
3 we had not yet noted that, because of the way
4 that our product works, you don't necessarily
5 hear an ad the minute you log on the way you
6 do in some of our competitors' products.

7 The assumption that somebody would
8 actually hear, you know, three spots an hour
9 or four spots an hour doesn't work out
10 mathematically, the way our product works,
11 because we don't introduce an ad at the
12 beginning. We introduce it at the point in
13 the broadcast wherever we are.

14 Q And that discounts --

15 A That discounts basically the total
16 number of ad avails that are available to be
17 sold.

18 Q Okay. Now in fact, you in your
19 deposition explained some of these
20 shortcomings when you were deposed. Correct?

21 A I did.

22 Q And do you recall when your

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1 deposition was?

2 A It was the last week in February.

3 Q Moving quickly here, let's take a
4 look at page 8, if we could. There is a
5 section here with a headline "The Narrow
6 Casting Argument." Can you just tell me what
7 you understand the idea of narrow casting to
8 be?

9 A Yes. That concept is that we
10 provide very specific genre stations to fans
11 of that specific music, and the argument is
12 that this in some way impacts sales of that
13 music, because it is available in a very
14 targeted fashion on a very narrow station of
15 genre interest.

16 Q And I take it, you put together
17 Exhibit 4 in response to this argument.
18 Correct?

19 A Yes. We provide every month with
20 our payment to SoundExchange a report
21 detailing total listening hours on the AOL
22 product, and it also provides total listening

1 hours by station. So empirical data is
2 available to show what listening looked like
3 on some of these narrow casted stations.

4 Q Okay. Now let's just take a look
5 at Exhibit 4. Can you just -- So we are all
6 clear on what is being displayed here, can you
7 just explain the document?

8 A This is a list of all of the
9 stations available on AOL radio listed in
10 order of total time spent listening in the
11 month of March, and it lists out the genre of
12 the stations, how many hours were listened,
13 and the total percentage of listening
14 happening on that station. That's the Percent
15 of Total column.

16 Q Okay.

17 A And the cume percent simply adds
18 up the number of stations that have been
19 listed at that point in terms of total
20 listening on an additive basis.

21 Q And this is from March 2006?

22 A Correct. Most months are

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1 substantively similar to this make-up, with
2 the exception of, you know, for instance, if
3 it is the holiday season and we put up some
4 Christmas stations, those tend to obviously
5 rise higher up in the rankings. But other
6 than that, this is representative.

7 Q Okay. Just tell us what
8 conclusion do you draw looking at, say, the
9 top 26 ranked stations here where you have the
10 line cutting across. What conclusion do you
11 draw from looking at these rankings?

12 A So the majority of listening is
13 happening in your broad genre stations, in
14 exactly the type of stations that you find in
15 terrestrial radio. You are looking at, you
16 know, top 20 hits. You are looking at
17 Seventies and Eighties music, top country,
18 adult alternative, the types of stations that
19 are airing in broadcast radio.

20 Q Now are these stations that you
21 would characterize as narrow or niche
22 stations?

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1 A No.

2 Q Where do those show up?

3 A They show up much further down the
4 list. As you sort of scroll through these
5 pages and bear down the list, you will see
6 that a lot of the stations that I would
7 interpret to be narrowcasted stations fall
8 well to the bottom of this list, usually lower
9 than a tenth of a percent of our total
10 listening hours.

11 Q And on what basis -- When you
12 describe these stations that are up toward the
13 top, on what basis would you compare them to
14 terrestrial radio stations?

15 A If you look at Exhibit 5, you see
16 that we polled from online a look at what
17 types of stations are available in major
18 markets in terrestrial radio, and they are
19 much the same types of stations.

20 Q Just so we are clear, there is a
21 Notes column on this document where you --

22 A We basically took a break here to

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1 indicate where 50 percent of listening, 60
2 percent, 70 percent, 80 percent was happening,
3 how many stations fell into that grouping. So
4 80 percent of our listening is happening in
5 the top 87 stations, but 50 percent of it is
6 happening in just the top 28 stations, which
7 are your broad genres. So the majority are
8 really happening in a very small number of
9 broad interest stations.

10 MR. LARSON: I have no more
11 questions.

12 CHIEF JUDGE SLEDGE: Mr. Joseph,
13 any questions?

14 MR. JOSEPH: No questions, Your
15 Honor.

16 CHIEF JUDGE SLEDGE: Mr.
17 Steintal?

18 MR. STEINTAL: Your Honor, one
19 more housekeeping issue with respect to NPR,
20 which I neglected to mention at the outset.

21 Ms. Brown has actually taken a
22 leave from Weil Gotshal to become General

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1 Counsel of a company here in Washington on a
2 six-month basis, and so she is not going to be
3 here representing NPR. There will be a
4 combination. Mr. Taylor will ask some
5 questions for NPR, and I or Mr. Sugarman of my
6 office may as well from time to time,
7 depending on scheduling.

8 So I just wanted to explain why
9 Ms. Brown isn't here, because she is taking an
10 opportunity. In this case, Mr. Taylor will be
11 representing NPR.

12 CHIEF JUDGE SLEDGE: Thank you.
13 Mr. Taylor, any questions?

14 MR. TAYLOR: Yes, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. TAYLOR:

17 Q Good morning, Ms. Winston. I am
18 David Taylor representing National Public
19 Radio.

20 I just want to explore one thing
21 that you mentioned. You had said that the AOL
22 service, when it begins, is different from

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1 some of your competitors' in that at the time
2 that a listener logs on, they do not
3 automatically hear a commercial as they would
4 with one of your competitors. Do you remember
5 that?

6 A Yes.

7 Q Do you view public radio as a
8 competitor of your AOL radio service?

9 A No, I do not.

10 Q And are you familiar with the fact
11 that public radio does not offer any
12 commercials on its webcasting service?

13 A Yes, I am.

14 MR. TAYLOR: No further questions.

15 CHIEF JUDGE SLEDGE: Mr. Malone?

16 MR. MALONE: Your Honor, IBS and
17 HRB have no questions.

18 CHIEF JUDGE SLEDGE: Mr.
19 Freundlich?

20 MR. FREUNDLICH: No questions.

21 CHIEF JUDGE SLEDGE: I'm sorry.
22 It has been a while. Getting, what is it, the

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1 spider webs.

2 Mr. Handzo?

3 MR. HANDZO: Thank you, Your
4 Honor.

5 BY MR. HANDZO:

6 Q Good morning, Ms. Winston.

7 A Good morning.

8 Q Just following up on Mr. Taylor's
9 last question, I take you, you would regard
10 broadcasters who simulcast their signal as
11 competitors of AOL?

12 A Yes, competitors listening to
13 music programs.

14 Q Now turning to page 2 of your
15 written statement --

16 A Yes.

17 Q -- you have some figures there for
18 in-stream advertising revenues and, like Mr.
19 Larson, I won't ask you the actual number so
20 we don't have to go into restricted session.
21 But you indicate that 2006 in-stream
22 advertising revenues at the time of the

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1 change, the change being when you put ads into
2 broadband, were approximately -- and you give
3 a number.

4 My question is: Through what date
5 were those revenues earned?

6 A I believe, through September.

7 Q Through September of 2006?

8 A I believe so, yes.

9 Q Let me just be clear. I am
10 focusing on the first number, not the second.
11 You have two numbers here.

12 A Yes. I believe these were our
13 forecasts and where we actually have come in.

14 Q Let me go back. You say the in-
15 stream advertising revenues at the time of the
16 change were approximately, and you have a
17 number.

18 A Yes.

19 Q And the change we are referring to
20 here is putting ads into broadband. Right?

21 A Our forecasts for the year at the
22 time that we -- before we put the change in

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1 place was the first number, and with the
2 change in place based on what happened in a
3 few of the subsequent months, we raised our
4 forecasts to double that amount. Does that
5 make sense?

6 Q Yes, but you confused me now in
7 another way. Are you telling me that these
8 numbers are your forecasts for the revenues
9 for the year?

10 A For audio advertising, audio only,
11 not banner.

12 Q For the year?

13 A Yes.

14 Q Okay. Because if you look at your
15 statement, it represents that those figures
16 are the revenues year to date. Do you see
17 that?

18 A Yes, and I apologize for that.
19 That is -- The second number is our forecast
20 for the year, and that was based on -- I
21 believe the reason that this is confusing is
22 that was based on revenues we had earned year

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1 to date and the run rate of those revenues.

2 Q So adding advertising to broadband
3 effectively doubled your in-stream advertising
4 revenues. Correct?

5 A It increased the revenue that AOL
6 was getting from Ronning Lipset. As I
7 understand it, this represents a share shift
8 of dollar to AOL from some of the other
9 partners in the advertising venture.

10 The way that it works is that
11 Ronning Lipset sells us an aggregate, and we
12 receive a share of what they sell based on the
13 total number of advertisements that we serve;
14 and because we increased the number of
15 advertisements that we serve, we took a larger
16 share of what Ronning Lipset was able to sell.

17 As I understand it, this
18 represents more of a share shift than a
19 marketplace demand issue, and I would defer to
20 Eric Ronning and his testimony as to what is
21 happening in the marketplace.

22 Q The bottom line is adding ads into

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1 broadband has doubled your revenues. Correct?

2 A AOL made more money, but the total
3 revenues being earned on Internet radio from
4 this partnership don't necessarily go up. So
5 in aggregate--

6 CHIEF JUDGE SLEDGE: You are not
7 answering his question.

8 THE WITNESS: Okay.

9 CHIEF JUDGE SLEDGE: You have
10 given an answer that he did not ask.

11 THE WITNESS: Okay. Please
12 restate the question.

13 BY MR. HANDZO:

14 Q Sure. My question is very simply:
15 Adding in-stream advertising to broadband has
16 doubled the revenues for AOL?

17 A Yes. AOL is making more money.

18 Q Okay. Now AOL still does not put
19 in-stream ads into certain of its radio
20 channels. Correct?

21 A Correct, the channels provided by
22 XM.

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1 Q And if it did, AOL would increase
2 its revenues. Correct?

3 A If we were to put advertisements
4 into the XM stations, it is unclear that XM
5 would continue to want to provide us with
6 those stations. I think it would change the
7 nature of our arrangement with them.

8 Q Well, assuming you got XM's
9 consent --

10 A Yes.

11 Q -- you would increase your
12 revenues, if you put in-stream ads into those
13 channels?

14 A Yes. We would get a larger share
15 of what Ronning Lipset sells.

16 Q With in-stream advertising in the
17 broadband channels now, your current sell-
18 through rate is what?

19 A In August it was 51 percent.
20 That's the last number I saw.

21 Q And that is running four ads per
22 hour?

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1 A Correct.

2 Q Now let me ask you to take a look
3 at a document we previously -- has previously
4 been admitted as SoundExchange Exhibit 26DR.

5 JUDGE WISNIEWSKI: Mr. Handzo, I
6 congratulate you for Xeroxing on paper that is
7 recycled.

8 MR. HANDZO: We are very
9 environmentally conscious, Your Honor.

10 BY MR. HANDZO:

11 Q Ms. Winston, that is, in fact, the
12 holding analysis that you were referring to
13 before. Correct?

14 A Correct. Yes, it is.

15 MR. LARSON: If I could just
16 interrupt. Just so we are clear, I believe it
17 was marked before as Exhibit 167 during the
18 direct phase of the testimony.

19 MR. HANDZO: Well, I can only tell
20 you what exhibit sticker is on there now. It
21 was submitted, I know, with Dr. Brynjolfsson's
22 amended testimony in the opening phase of the

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1 case, and I think it had the exhibit number
2 that I recited. It might have also been used
3 in another time in the trial.

4 BY MR. HANDZO:

5 Q In any event, that is the holding
6 analysis that you are talking about?

7 A Correct.

8 Q If you look at the third page, at
9 the bottom you see that you have some
10 estimates or projections or whatever you want
11 to call them about what the sell-through rate
12 is going to be if you open up broadband to
13 advertising. Correct? Yes?

14 A Yes. Sorry .

15 Q And in fact, if you look at the
16 number for 2006, it is actually about where
17 you, in fact, have wound up. Right?

18 A Yes. It indicates that for the
19 year it would be 50 percent.

20 Q And when you made that projection,
21 you were assuming only three ads per hour.
22 Correct?

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1 A That is correct, although I would
2 say that again it was not a projection for
3 what I felt would actually occur.

4 Q All right. Whatever you want to
5 call it, you put down 50 percent as the sell-
6 through rate selling three ads per hour.

7 A That is correct. Yes.

8 Q And in fact, you have hit 50
9 percent selling four ads per hour.

10 A Correct.

11 Q You mentioned in your testimony,
12 Ms. Winston, that AOL is going to get out of
13 the business of selling broadband access. Is
14 that right?

15 A Correct.

16 Q But it is still in that business
17 as of today, is it not?

18 A Yes.

19 Q Do you know exactly when AOL is
20 going to get out of that business?

21 A I do not know exactly when we will
22 get out of that business, in that it will

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1 depend on how quickly users migrate from the
2 paid off rank to the free offering.

3 Q For the time being, as long as AOL
4 is still offering broadband access, it is
5 still using the premium radio service as one
6 of the incentives to get people to subscribe
7 to that service. Is that not right?

8 A We are not using it as an
9 incentive, as we have ceased all marketing for
10 the broadband subscription service. AOL is
11 not spending marketing dollars looking for
12 broadband subscribers.

13 Q Ms. Winston, I am going to show
14 you what I have marked as SoundExchange Trial
15 Exhibit 136, and I can't represent for sure
16 that this was done in recycled paper. In
17 fact, it was not.

18 JUDGE WISNIEWSKI: You are right.

19 (WHEREUPON, THE DOCUMENT
20 REFERRED TO WAS MARKED
21 AS SX TRIAL EXHIBIT NO.
22 136 FOR IDENTIFICATION.)

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1 BY MR. HANDZO:

2 Q Ms. Winston, do you recognize this
3 as a AOL web page?

4 A Yes.

5 Q And this is a current AOL web
6 page. Correct?

7 A I can't say for sure, but if you
8 tell me you printed it recently, I am willing
9 to --

10 Q I will tell you we printed it
11 yesterday.

12 A Okay.

13 Q And you see there where it says,
14 if you do keep AOL as your connection to the
15 Internet, you get all the benefits of free AOL
16 plus additional benefits not available to free
17 users. You see that? Yes?

18 A Yes, I do. Sorry.

19 Q And one of those benefits not
20 available to free users is more choices on AOL
21 radio. Correct?

22 A Yes.

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1 Q All right. So this is what AOL is
2 telling people who are either current
3 subscribers to its broadband service or
4 potential subscribers. Correct?

5 A That appears to be the case, yes.

6 Q And what AOL is telling those
7 people is that the reason they opt to
8 subscribe or keep their subscription is that
9 they get the premium radio product.

10 A Well, it is one of the things
11 listed here, yes.

12 Q And AOL currently charges what for
13 that subscription service?

14 A There are different price plans.
15 So it could vary. There is a dial-up price
16 plan that is approximately \$24, and then there
17 are some other high speed add-ons that someone
18 can purchase to get additional services, if
19 they do have a broadband connection and want
20 things like virus protection, etcetera; and
21 those are priced at the current price points
22 for those things. But there is no price point

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1 plan for an a la carte radio product.

2 Q So the subscription is \$24 and up?

3 A No, \$24 and down.

4 Q I asked you a few questions before
5 about the XM channels that AOL offers. Am I
6 correct that there are 20 channels programmed
7 by XM that are currently available to anyone
8 who wants to listen to AOL radio?

9 A Yes.

10 Q And there are an additional 50
11 that are -- 50 XM channels that are available
12 to subscribers?

13 A Only to the current broadband
14 subscribers. There are 20 available to the
15 narrow band subscribers, just as there are to
16 anyone listening to it free on the Web.

17 Q Okay. And then 50 available to
18 the broadband subscribers?

19 A Fifty additional to the broadband
20 subscribers.

21 Q And none of those channels carry
22 in-stream audio advertising. Right?

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1 A Correct.

2 Q Now in your statement on page 4,
3 just above the section that addresses Dr.
4 Brynjolfsson's holding analysis, you state
5 that AOL includes the XM channels not to
6 attract listeners but as a cost shifting
7 mechanism. Do you see that?

8 A Correct. Yes.

9 Q You are not saying surely that AOL
10 derives no monetary benefit from those XM
11 channels?

12 A We do, in that XM covers the cost
13 of listening. So if XM programs an Eighties
14 station for us, we don't pay royalties on an
15 Eighties station of our own.

16 Q AOL derives monetary benefits by
17 offering those channels to its listeners, does
18 it not?

19 A We have cost savings, yes.

20 Q And it derives additional revenue
21 by virtue of offering those channels, doesn't
22 it?

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1 A No.

2 Q Well, let me ask you this. AOL
3 pays the bandwidth costs for those XM
4 channels, does it not?

5 A Yes, we do.

6 Q So if this was just a cost saving
7 mechanism, you would save a lot more money by
8 just not offering the channels at all. Right?

9 A No. If we didn't offer the XM
10 stations, we would need to bring back our own
11 stations covering major genres like Eighties
12 music, and then we would be paying the
13 royalties on those stations again, as we did
14 in the past.

15 So in some ways, there has been a
16 replacement here. We have actually sunsetted
17 some of the stations that we used to offer and
18 replaced them with XM stations. So we really
19 have just switched out the bandwidth costs
20 that we were paying for our own station for
21 bandwidth for an XM station.

22 Q And the reason you would need to

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1 bring back those AOL stations is that you
2 would lose listeners if you didn't have those
3 stations. Right?

4 A Sure. Variety is the selling
5 point.

6 Q Okay. And you make money by
7 bringing listeners to the AOL portal. Right?

8 A We make money by having listeners
9 who listen to audio ads and see banner ads,
10 yes.

11 Q And you also make money by
12 bringing listeners into the portal and having
13 them go to other places and see other content
14 and look at other ads. Right?

15 A Yes, and we make money because
16 they come into other parts of the network and
17 come to radio then and discover it, and see
18 ads there.

19 Q That's the point of a portal.
20 Right?

21 A Exactly.

22 Q Bring people into the portal, and

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1 they circulate around.

2 A Yes.

3 Q And the more people you can bring
4 in, the more money you are going to make.

5 A Correct.

6 Q And having those XM channels helps
7 bring in those people, doesn't it?

8 A Having a variety of channels does,
9 yes.

10 Q Okay. Now in addition to whatever
11 AOL might make by bringing in people to
12 listen to those XM channels, AOL also gets
13 some commerce opportunities through those XM
14 channels, doesn't it?

15 A Do you mean do we sell things off
16 of the radio product? I'm not sure I
17 understand the question.

18 Q Well, let me do this. Ms.
19 Winston, I am going to show you what I have
20 marked as SoundExchange Exhibit 137.

21 A Thank you.

22 (WHEREUPON, THE DOCUMENT

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3 N O . 1 3 7 F O R
4 IDENTIFICATION.)

5 Q Ms. Winston, this is a screen shot
6 of the AOL media player, is it not?

7 A It is the radio player, yes.

8 Q The radio player. And it is a
9 shot of the radio player playing an XM
10 channel. Correct?

11 A Correct.

12 Q In this case, XM 80?

13 A Yes.

14 Q All right. Down near the bottom
15 of the player, do you see something that says
16 "Sign up for XM"?

17 A Yes.

18 Q And if the listener clicks on
19 that, they will be taken to a page that allows
20 them to sign up for XM satellite radio.
21 Correct?

22 A Correct.

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1 Q And if they do that, AOL earns a
2 bounty, does it not?

3 A I am not aware that we do, and
4 this may go to my familiarity with the
5 particulars of the XM deal, but I am not aware
6 that we earn a bounty.

7 Q You just don't know, one way or
8 the other?

9 A No, I don't. I apologize.

10 Q You also see something that says
11 "Music downloads" there. Do you see that?
12 And if the listener clicks on that, they will
13 go to AOL's On Demand music service. Correct?

14 A I believe so, yes.

15 Q And that is a subscription
16 service?

17 A It is a subscription service.
18 Correct.

19 Q AOL makes 9.95 a month from those
20 who subscribe?

21 A Yes. We make money, and we pay
22 royalties to the labels for that money that we

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1 make.

2 Q There is also a line here that
3 says "Buy tickets." Do you see that?

4 A Correct.

5 Q And if somebody clicks on that,
6 that takes you to AOL's ticket service.
7 Correct?

8 A Correct.

9 Q And if you buy tickets through
10 that, AOL makes money that way, too.

11 A Correct.

12 Q So there are commerce
13 opportunities related to these XM channels.
14 Right?

15 A There are, and in every instance
16 where AOL offers the commerce directly, we are
17 paying appropriate royalties and have separate
18 licenses to pay out revenue share on that
19 money to the parties that own the content.

20 Q One would hope, but you are also
21 making money on that. Right?

22 A Correct.

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1 MR. HANDZO: Your Honor, I would
2 offer Exhibit 137 into evidence.

3 CHIEF JUDGE SLEDGE: Any objection
4 to SoundExchange Exhibit 137?

5 MR. LARSON: No objection, Your
6 Honor.

7 CHIEF JUDGE SLEDGE: Without
8 objection, it is admitted.

9 (WHEREUPON, THE DOCUMENT
10 REFERRED TO, PREVIOUSLY
11 MARKED AS SOUNDEXCHANGE
12 EXHIBIT NO. 137 FOR
13 IDENTIFICATION, WAS
14 ADMITTED INTO EVIDENCE.)

15 BY MR. HANDZO:

16 Q Ms. Winston, you mentioned that
17 AOL is essentially changing its business model
18 to become a portal where its content is
19 offered for free. Do you recall that?

20 A We had already changed our
21 business model last June to become a portal
22 where content was offered for free. The

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1 current change that was announced at the
2 beginning of August is that we are no longer
3 to be in a broadband subscription business.

4 Q And in connection with those
5 changes, AOL has been out in the marketplace
6 attempting to essentially sell itself to
7 consumers -- Correct? -- and explain these
8 changes?

9 A Correct.

10 Q All right. Let me show you a
11 document that we have marked as SoundExchange
12 Trial Exhibit 138. Let me ask you first, are
13 you familiar with this document?

14 A I have not seen this document
15 before.

16 Q Have you seen documents like this
17 one?

18 A I have seen various PowerPoint
19 presentations, yes, but I don't -- I haven't
20 seen this document. I am happy to try to
21 answer, but I haven't seen this before.

22 (WHEREUPON, THE DOCUMENT

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4 IDENTIFICATION.)

5 Q Well, let me ask you to turn to
6 page 6 of this document, please.

7 A Okay.

8 Q You see there is a section where
9 it says "Overarching Message."

10 A Yes.

11 Q And that is intended to be the
12 overarching message that AOL gives to
13 customers and potential customers. Right?

14 MR. LARSON: Your Honor, I would
15 object to the question. Lack of foundation
16 that the witness has any knowledge of what
17 this document is, and can answer to what it is
18 intended to be communicated.

19 CHIEF JUDGE SLEDGE: Overruled.
20 If she has that information, she can answer
21 it.

22 THE WITNESS: Can you repeat the

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1 question, please?

2 BY MR. HANDZO:

3 Q Sure. This page, basically,
4 contains the overarching message that AOL is
5 trying to communicate to consumers. Correct?

6 A Yes.

7 Q Okay. And it indicates that,
8 along with this overarching message, the
9 communication to consumers would include what
10 this refers to as relevant proof points. Do
11 you see that?

12 A I see that, yes.

13 Q And those proof points would be
14 specific aspects of the AOL service that are
15 being touted to consumers. Correct?

16 A Yes. I mean, the basic message we
17 want to get out to consumers is that you no
18 longer have to -- If you have your own
19 connection to the Internet, you no longer have
20 to pay AOL to keep your AOL e-mail address and
21 to get to everything that you use today from
22 AOL. So that people are not switching to

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1 another e-mail provider and taking along with
2 it all of their content usage and advertising
3 dollars, which had been the dynamic going on
4 in the marketplace for us.

5 Q Now if you turn to page 12, one of
6 the proof points that is being suggested here
7 in terms of the message to consumers relates
8 to AOL radio. Correct?

9 A Yes. It appears to.

10 Q So in terms of the guidance that
11 AOL is providing in terms of how to market the
12 new AOL, radio is part of that marketing
13 message. Correct?

14 A Yes, although I am confused as to
15 how these two things relate to one another in
16 that the first page you are referring to
17 relates to somebody getting our access for
18 free and not paying us a subscription. So
19 this proof point would be about a free
20 service.

21 Q All of the services are going to
22 be free. Right?

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1 A Yes.

2 Q Okay.

3 A So this could be a proof point for
4 why somebody would use our free services.

5 Q Right.

6 A Okay.

7 Q And in fact, it is a proof point
8 as to why somebody would use your free
9 services. Right?

10 A It is one of the things that we
11 offer that consumers like and use.

12 MR. HANDZO: May I just have a
13 moment, Your Honor.

14 CHIEF JUDGE SLEDGE: Sure.

15 BY MR. HANDZO:

16 Q Just one more thing, Ms. Winston.
17 Let me show you what I have marked as
18 SoundExchange Trial Exhibit 139 and ask you to
19 take a look at that.

20 The first question is whether you
21 have seen this document before.

22 A I had at the time that the deal

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1 was being negotiated. Yes.

2 (WHEREUPON, THE DOCUMENT
3 REFERRED TO WAS MARKED
4 AS SOUNDEXCHANGE EXHIBIT
5 N O . 1 3 9 F O R
6 IDENTIFICATION.)

7 Q And if you flip to -- I believe it
8 is the second page -- two bullet points up
9 from the bottom of the page where it says --
10 two points above where it says "exclusivity
11 noncompete" --

12 A Yes.

13 Q Two bullet points up there is a
14 bullet point about XM paying bounties to AOL.
15 Do you see that?

16 A Correct.

17 Q A \$15 commission for every
18 satellite service activation. Do you see
19 that?

20 A Yes.

21 Q Is that accurate, to your
22 knowledge?

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1 A It would appear to be from this
2 document, yes.

3 MR. HANDZO: Your Honor, I would
4 move the admission of SoundExchange Trial
5 Exhibit 139.

6 CHIEF JUDGE SLEDGE: Any objection
7 to Exhibit 139?

8 MR. LARSON: No, Your Honor.

9 CHIEF JUDGE SLEDGE: Without
10 objection, 139 is admitted.

11 (WHEREUPON, THE DOCUMENT
12 REFERRED TO, PREVIOUSLY
13 MARKED AS SOUNDEXCHANGE
14 EXHIBIT NO. 139 FOR
15 IDENTIFICATION, WAS
16 RECEIVED INTO EVIDENCE.)

17 MR. LARSON: Your Honor, I would
18 move to have this exhibit entered under the
19 terms of the protective order. It is clearly
20 an internal document describing in some detail
21 the contents of the contract between XM and
22 AOL, which is not publicly known and clearly

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1 competitively sensitive.

2 CHIEF JUDGE SLEDGE: Any objection
3 to the motion to apply the protective order to
4 this exhibit?

5 MR. HANDZO: No, Your Honor.

6 MR. LARSON: Thank you, Your
7 Honor.

8 CHIEF JUDGE SLEDGE: Well, I
9 haven't ruled yet. What is the date of this
10 exhibit?

11 MR. LARSON: It appears to be
12 undated, Your Honor. I believe the XM
13 agreement was struck within the last year.

14 THE WITNESS: It is a 2005
15 document. That much I can tell you, probably
16 around mid-year.

17 CHIEF JUDGE SLEDGE: And, Mr.
18 Larson, what parts of it do you consider
19 confidential?

20 MR. LARSON: Well, certainly any
21 parts of it that describe financial terms
22 between the parties. I would have to look at

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1 it in some detail to identify specific ones,
2 but it appears to me to be a summary of
3 agreement points. Under the product section,
4 it explains what AOL -- or what XM is
5 providing. Under the marketing commitments,
6 it describes what AOL agrees to undertake and
7 what XM agrees to undertake in terms of its
8 marketing. The whole document, really,
9 encapsulates, at least at the stage it was
10 written, what was intended to be in the deal.

11 We could try to redact it, if
12 necessary, in some way, but it is a currently
13 operating agreement out there that is not
14 publicly known, and this --

15 CHIEF JUDGE SLEDGE: Not publicly
16 known is not a concept that is relevant, as I
17 understand it. Maybe you will educate me more
18 as we get our briefs next week on the
19 protective order, but as I understand it, that
20 is not a term that means anything.

21 MR. LARSON: Well, I mean, under
22 the terms of the protective order that is in

1 place in this proceeding, clearly, I think the
2 fact that the agreement is not publicly known
3 indicates that it is competitively sensitive
4 and not something the parties would want
5 shared with Yahoo!, for example, or other
6 people that could see it.

7 So I do think it is relevant that
8 it is something that they would keep secret
9 or, you know, within the company. That was,
10 as I understood it, the point of entering into
11 our protective order between the parties, to
12 be able to shelter competitively sensitive
13 documents like this.

14 CHIEF JUDGE SLEDGE: We will take
15 this under advisement and let you know after
16 the break.

17 MR. LARSON: Thank you, Your
18 Honor.

19 CHIEF JUDGE SLEDGE: Mr. Handzo,
20 that completes your questioning?

21 MR. HANDZO: Yes, it does, Your
22 Honor. thank you.

1 CHIEF JUDGE SLEDGE: Mr. Larson,
2 any further questions?

3 MR. LARSON: Your Honor, I wonder
4 if we could just have -- Maybe it would be a
5 good time to take our break, and then we could
6 discuss whether we have questions or, if not,
7 if I could just have a couple of minutes.

8 CHIEF JUDGE SLEDGE: We'll take a
9 few minutes. We won't break for another 25
10 minutes. That clock is an hour ahead.

11 MR. LARSON: Your Honor, we have
12 no redirect.

13 CHIEF JUDGE SLEDGE: Mr. Joseph?

14 MR. JOSEPH: Nothing, Your Honor.

15 CHIEF JUDGE SLEDGE: Mr. Taylor?

16 MR. TAYLOR: Nothing, Your Honor.

17 CHIEF JUDGE SLEDGE: Mr. Malone?

18 MR. MALONE: We have no further
19 questions, Your Honor.

20 CHIEF JUDGE SLEDGE: Mr. Oxenford?

21 MR. OXENFORD: No questions, Your
22 Honor.

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1 CHIEF JUDGE SLEDGE: Any questions
2 from the bench? Thank you, Ms. Winston, you
3 are excused.

4 All right. We will now take a
5 recess until eleven o'clock, and -- do we need
6 that long? That is 20 minutes.

7 MR. STEINTHAL: Your Honor, Mr.
8 Lam flew in late last night from California.
9 We called him, as things were progressing
10 rather smoothly this morning, and woke him up.
11 So he is going to get here as soon as he can.
12 The direct for Mr. Lam will be no longer than
13 half an hour, and probably less than that.

14 So the likelihood is that, if the
15 cross-examination is commensurate with the
16 direct examination, we will be done by lunch
17 today.

18 We have lined up the witnesses
19 based on their availability and have two
20 witnesses scheduled for tomorrow, Mr. Fancher
21 in the morning and Mr. Nebel in the afternoon,
22 and have no expectation that we would run long

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1 tomorrow.

2 So we just may finish early today.
3 We can't get Mr. Nebel here or Mr. Fancher
4 here this afternoon, but it will not set us
5 back, based on the schedule we have in which
6 the one curve ball is the Wednesday, because
7 we had two witnesses scheduled, and what we
8 will try to do is Mr. Isquith was going to be
9 testifying on Wednesday, and then on Thursday
10 we had Mr. Roback and Mr. Frank, both from
11 Yahoo!

12 We will try to see what we can do
13 with Mr. Isquith. We don't believe we can get
14 him here tomorrow, which would be ideal; and
15 if he doesn't go on Wednesday, we will try to
16 slot him in first thing Monday, in light of
17 everything else. But we will do our best to
18 get everybody lined up so we can get all the
19 webcaster witnesses done this week, with that
20 one footnote as to Mr. Isquith.

21 CHIEF JUDGE SLEDGE: Well, what is
22 your projection on when we should start back?

1 MR. STEINTHAL: Maybe ten after
2 eleven. We will give him another call right
3 now. It's only 15 minutes from the hotel to
4 here. So, hopefully, he will be able to get
5 here by eleven, 11:15 latest, and we will
6 still finish by lunch.

7 CHIEF JUDGE SLEDGE: Mr. Joseph?

8 MR. JOSEPH: Nothing. I was just
9 standing for going into recess.

10 CHIEF JUDGE SLEDGE: All right.
11 We will recess until eleven o'clock.

12 (Whereupon, the foregoing matter
13 went off the record at 10:40 a.m. and went
14 back on the record at 11:15 a.m.)

15 CHIEF JUDGE SLEDGE: We will come
16 to order.

17 MR. STEINTHAL: Your Honor, the
18 webcasters call Mr. Lam. Good morning, Mr.
19 Lam.

20 MR. LAM: Morning.

21 CHIEF JUDGE SLEDGE: Just a
22 moment, Mr. Steinthal. Apparently, I've got

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1 a blank screen, and I don't know why. Looks
2 like I somehow got cut off, it looks like.

3 Before we begin with Mr. Lam, we
4 have pending the motion to apply the
5 protective order on Exhibit 139. That motion
6 is granted.

7 Mr. Lam, if you will please stand,
8 I need to swear you in.

9 WHEREUPON,

10 N. MARK LAM
11 was called as a witness by counsel for the
12 Webcasters and, having first been duly sworn,
13 assumed the witness stand, was examined and
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. STEINTHAL:

17 Q Good morning, Mr. Lam.

18 A Good morning.

19 Q Do you recall generally having
20 testified in the first phase of these
21 proceedings?

22 A Yes, I do.

1 Q Can you remind the panel briefly
2 what your title is at Live365 and what Live365
3 does?

4 A Yes. I am the CEO of Live365, and
5 Live365 offers Internet radio service for the
6 Web and has been streaming since July 1999.

7 Q Now there is a phrase that has
8 been used, "aggregator station." Is Live365
9 an aggregator of Internet radio stations?

10 A Yes. We have roughly 10,000
11 stations on our network.

12 Q And do some of them include
13 individual broadcasters or hobbyists that
14 create their own stations for purposes of
15 broadcasting?

16 A Yes, thousands and thousands of
17 them.

18 Q Now let me direct you to Paragraph
19 3 of your written rebuttal testimony. In that
20 paragraph and then in the next paragraph you
21 state that Professor Brynjolfsson in his
22 amended testimony misstated and

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1 mischaracterized Live365's business model by
2 attributing irrelevant revenues to DMCA
3 compliant webcasting.

4 Can you explain to the panel what
5 you mean by irrelevant revenues?

6 A Okay. There are three -- In our
7 view, there are three separate streams of
8 income. One of them is subscription
9 listening. We call it VIP listening. The
10 other one is the ad supported revenue,
11 actually, and the third one is what we charge
12 broadcasters to actually help defray the cost
13 of providing the platform to broadcast.

14 Actually, for the business scale
15 and for to sustain itself, we actually have to
16 either get it from the listeners who pay or
17 our service has ad supported. The broadcast
18 service in which we provide and which we are
19 charging the customers right now is not
20 scalable and is only an interim measure for us
21 to basically defray our costs. Otherwise, we
22 have no way of sustaining our service.

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1 As I testified last time, we have
2 gone through roughly \$60 million already since
3 the founding of the company about nine years
4 ago, and so we had to find an interim model to
5 make sure that we could, hopefully, live on to
6 see another day.

7 Q Let me parse through the three
8 categories of income that you talked about.
9 The subscription revenues are when subscribers
10 receive ad-free stations from Live365 in
11 return for paying a subscription fee per month
12 to Live365?

13 A Correct.

14 Q And that is relevant revenue.
15 That is not irrelevant revenue. Right?

16 A That is relevant revenue.
17 Correct. It is about 30 -- a little bit over
18 30 percent.

19 Q And then there is the advertising
20 that you sell in connection with the offering
21 of the actual channels. Correct?

22 A Correct.

1 Q And that is relevant revenue?

2 A That is relevant. Correct.

3 Q Now the third category of revenue
4 that you talked about in connection with
5 defraying costs -- is that revenue
6 attributable to the actual transmission of
7 sound recordings on any of your stations?

8 A No, definitely not. As I
9 mentioned earlier, the reason why we were
10 forced to charge that is because otherwise we
11 would not be even in existence today.

12 Q But beyond that issue, would the
13 individual hobbyists -- If they didn't pay you
14 for the provision of the broadcast services
15 that you provide that you testified about,
16 would they themselves have to incur those
17 costs?

18 A Yes.

19 Q So in essence, you are selling or
20 renting services to them --

21 A Correct.

22 Q -- for purposes of their

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1 facilitating their ability to broadcast?

2 A Correct.

3 Q And roughly how much of the total
4 income, of the three buckets as a whole, is
5 represented by this, basically selling of
6 services to these other broadcasters?

7 A Those are 50 percent -- in fact,
8 45 percent, to be exact.

9 Q Okay. Now in Paragraph 4 of your
10 written statement, you refer to Professor
11 Brynjolfsson having made reference to a very
12 high annual compound growth rate for Live365,
13 and criticize him for doing that.

14 What did you mean by that?

15 A As you know, Live365 in the
16 beginning practically had no revenue. So for
17 example, Fiscal year 2002 was the year that it
18 actually started to see some revenue of
19 roughly \$1 million, and then Fiscal year 2003,
20 which -- Fiscal year 2003, we had revenue of -
21 - Excuse me.

22 CHIEF JUDGE SLEDGE: Proceed. I

1 don't have any optimism that that will get any
2 better.

3 THE WITNESS: Okay. Then I speak
4 loud. In Fiscal Year 2003, we had revenue of
5 about \$2.3 million, and then in Fiscal 2004 we
6 have about 4.5. In Fiscal Year 2005 we had
7 about 6.4.

8 So taking the small basis, of
9 course, the percentage looks huge where we
10 have no revenue, let's say, in Fiscal Year
11 2001, going to 2002, and then from 2002 to
12 2003. They could be construed as on a
13 compounded basis rather dramatic, but when you
14 have a basis that small, I mean, you could
15 have a 5,000 percentage revenue. It doesn't
16 really matter, because the reality is, in
17 order for us to keep streaming, it costs
18 millions and millions of dollars a year.

19 BY MR. STEINTHAL:

20 Q Let me first, for purposes of just
21 the transcript -- I asked you about the
22 compounding, and you gave an answer that

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1 included the revenue figures that you just
2 talked about.

3 Are those revenue figures public
4 information or are those revenue figures that
5 you consider to be confidential and should be
6 subject to some sort of protective order?

7 A They should be subject to
8 protective order. We are a private company.

9 MR. STEINTHAL: Your Honor, I
10 would move that the testimony specific to the
11 annual revenues of Live365 be treated as
12 restricted under the protective order.

13 CHIEF JUDGE SLEDGE: And where is
14 that?

15 MR. STEINTHAL: Well, it has just
16 been given in answer to the question about the
17 compound growth issue.

18 CHIEF JUDGE SLEDGE: Where is
19 that?

20 MR. STEINTHAL: It was my last
21 question.

22 CHIEF JUDGE SLEDGE: Where is it

1 in his written testimony?

2 MR. STEINTHAL: Well, he talks
3 about the compound growth issue in Paragraph
4 4, Your Honor. It is the sentence that starts
5 "Second." He uses data from the years, and
6 goes on.

7 CHIEF JUDGE SLEDGE: All right.
8 In the middle of page 3 of the written
9 testimony. Any objection to the figures
10 stated therein in the paragraph dated "Second"
11 as being subject to the restrictive order?

12 MR. SMITH: No, Your Honor.

13 CHIEF JUDGE SLEDGE: Without
14 objection, those figures are -- The
15 protective order applies.

16 MR. STEINTHAL: And my motion,
17 Your Honor, also pertained to the actual
18 answer given today, which gave specific annual
19 numbers.

20 CHIEF JUDGE SLEDGE: Beyond what
21 is in his written testimony?

22 MR. STEINTHAL: Yes.

1 CHIEF JUDGE SLEDGE: What are
2 those figures?

3 MR. STEINTHAL: I think he just
4 testified as to annual figures for Fiscal
5 Years 2003, 2004 and 2005, and what the annual
6 increment was. I think it is just the prior
7 two questions and answers.

8 CHIEF JUDGE SLEDGE: Looking at
9 the middle of page 3, I am not clear on what
10 those answers are, any different from that.
11 Please re-ask that question.

12 MR. STEINTHAL: Well, Your Honor,
13 it was in the context of asking the -- getting
14 the answer to the question. He gave specific
15 figures that refer specifically to the annual
16 growth figure stated in Paragraph 4. So it is
17 simply the actual annual revenue statistics
18 that the witness cited that I am making the
19 motion to keep under the protective order.

20 CHIEF JUDGE SLEDGE: Sounds like
21 the way you are describing it that he has
22 given information that is not answering a

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1 question you asked. If you will ask him the
2 question, we will determine if that should
3 apply the protective order.

4 BY MR. STEINTHAL:

5 Q Is the annual revenue information
6 that you gave in response to my last question
7 confidential information that is not public to
8 Live365?

9 CHIEF JUDGE SLEDGE: You are not
10 responding to my direction, Mr. Steintal.
11 From the way you characterized his testimony,
12 it sounds like he was giving information for
13 a question that had not been asked. So if you
14 will ask him the question, then we will
15 consider the answer as to whether the
16 protective order applies.

17 (Whereupon, the foregoing matter
18 went off the record at 11:29 a.m. for Closed
19 Session, and went back on the record at 11:30
20 a.m.)

21

22

1 CHIEF JUDGE SLEDGE: All right.
2 Any objection to applying the protective order
3 to the testimony for the revenue for 2002,
4 2003, 2004, and 2005?

5 MR. SMITH: No, Your Honor.

6 CHIEF JUDGE SLEDGE: Without
7 objection, that motion is granted.

8 BY MR. STEINTHAL:

9 Q And did the figures you just gave,
10 without restating them on the record, include
11 the revenues associated with the selling of
12 services to broadcasters to facilitate their
13 ability to put music on the Web?

14 A Correct.

15 Q Okay. In paragraph 5 of your
16 written rebuttal testimony, you talk about
17 Live365 having sold advertising revenue
18 through the RLR network, Ronning Lipset, and
19 Value Click. and you make a statement that the
20 cost of selling ads through third party rep
21 firms is painful, to use your words.

22 Can you explain what you meant by

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1 painful?

2 A Yes. We used two outside --
3 primarily two outside networks to sell our
4 ads, in addition to charges that were
5 internally, and we -- In the case of Value
6 Click, we had to give up half the gross
7 revenue to Value Click for the graphics ads,
8 and in terms of RLR we had to give them about
9 40 percent. We give that 40 percent in order
10 to even get sold by RLR within the bigger
11 context. We have to first pay a substantial
12 amount of money to Arbitron and comScore to
13 get rated.

14 So it -- I think we also see in
15 terms of net income it is less -- It is about
16 half of what we receive. So for example, if
17 we receive an income of \$2 million, actually
18 the dollars that we see in our pocket is only
19 1 million. So that's why it is really
20 painful, and we really do try to sell
21 internally, but we just can't.

22 Q When you say you really try to

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1 sell internally, what do you mean by that?

2 A We have hired a Director of
3 Advertisement who have years of experience and
4 then for many, many months we just cannot get
5 the accounts to -- you know, to have
6 substantial order of advertising.

7 In fact, since the founding of the
8 company -- The company was founded on the
9 premises that ads would pay for listening, and
10 we had tried year after year -- you know, we
11 have hired different staff. We tried
12 different methods and all that, but to no
13 avail. I mean, we have found that we could
14 rarely sell beyond a million dollars in
15 revenue.

16 Q Are you familiar with the fact
17 that Professor Brynjolfsson has asserted that
18 webcasters have made a conscious choice not to
19 maximize cash flow by not running ads as much
20 as they could?

21 A That is totally inaccurate. If we
22 could sell ads, there is no reason why we

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1 would not want to do so.

2 Q Has Live365 ever not sold ads that
3 were attainable or available to it, to your
4 knowledge?

5 A No.

6 Q One last thing, Mr. Lam. In
7 Paragraph 6 of your written testimony, you
8 talk about certain listening patterns on
9 Live365. Are you familiar with a term called
10 narrow casting, as it has been used by the
11 RIAA in this proceeding?

12 A I believe so.

13 Q What is your understanding of what
14 it means?

15 A Well, narrow casing is targeting
16 just a very small segment of people who are
17 interested in a certain type of music.

18 Q And you mentioned that Live365
19 aggregates up to 10,000 stations. Is that
20 right?

21 A Roughly.

22 Q In response to the assertions by

1 the RIAA about how services like yours have
2 the ability to narrow cast and offer thousands
3 of stations, did you do any kind of analysis
4 of what, in fact, users do do when they listen
5 to Live365?

6 A Yes, we did.

7 Q And can you tell us what that
8 showed with respect to what the listening
9 patterns are with respect to the volume of
10 different channels that consumers actually
11 listen to?

12 A We found that, actually, consumers
13 tend to just select very few stations and
14 settle on them. In fact, I think -- let me
15 see an exhibit here. Let me make sure I got
16 the figures out.

17 I think we found about 43 percent
18 of the people actually -- We took a sample in
19 April this year for one week. We found that
20 about 43 percent of the people just listen to
21 one station, and then cumulatively speaking,
22 there are about 61 percent of the people who

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1 only listen to two stations, and then about
2 78.7 percent of people listen to four
3 stations.

4 So that means, actually, a lot of
5 people -- they just settle on something they
6 like and just listen to it.

7 MR. STEINTHAL: I have no further
8 questions, Your Honor.

9 CHIEF JUDGE SLEDGE: Mr. Joseph?

10 MR. JOSEPH: Mr. Astle is handling
11 this witness, actually, Your Honor.

12 MR. ASTLE: We have no questions.

13 CHIEF JUDGE SLEDGE: Well said.
14 Mr. Taylor?

15 MR. TAYLOR: No questions at this
16 time, Your Honor.

17 CHIEF JUDGE SLEDGE: Mr. Smith?

18 MR. SMITH: Thank you, Your Honor.

19 BY MR. SMITH:

20 Q Hello, Mr. Lam. My name is Paul
21 Smith representing SoundExchange. Nice to see
22 you.

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1 A Hello, Mr. Smith.

2 Q As I understand your testimony,
3 Mr. Lam, it is that Dr. Brynjolfsson went
4 astray in saying that the information he got
5 from your documents confirmed the analysis he
6 had already done using public materials about
7 the economics of webcasting. Is that correct?

8 A Yes.

9 Q And you were pretty polite here
10 this morning, but in fact in your written
11 testimony you are pretty severe in your
12 criticisms of Dr. Brynjolfsson, are you not?

13 A I think, actually, it is about the
14 same, if you choose to say so.

15 Q Well, just so it's clear,
16 referring to the bottom of page one, the top
17 of page 2 of your written testimony, you
18 accuse Dr. Brynjolfsson of grossly
19 mischaracterizing and misinterpreting the
20 Live365 data. Do you see that?

21 A I believe so, yes.

22 Q And you accuse him of improperly

1 lifting documents from their proper context.

2 A Yes.

3 Q And misleading the Board by
4 counting this revenue that you were referring
5 to, the broadcaster revenue.

6 A Correct.

7 Q Okay. Now let me start with one
8 of the areas in which you say Dr. Brynjolfsson
9 mischaracterized the data. That's the one you
10 didn't mention this morning, but it is the
11 first one you mentioned in your written
12 statement, which is the accusation that Dr.
13 Brynjolfsson relied on projected revenues and
14 treated them as if they were actual revenues.
15 Do you recall making that statement in your
16 written statement?

17 A Correct. Correct.

18 Q And the document that Dr.
19 Brynjolfsson relied on was a document that had
20 both actual data in it and projections. Isn't
21 that right?

22 A Which document you are referring

1 to, please?

2 Q Let me hand you the document that
3 is cited by Dr. Brynjolfsson, which has
4 previously been entered as SoundExchange
5 Exhibit 23DR. If you would like to check, I
6 could give you his amended direct testimony,
7 if you would like, Mr. Lam, to see if this
8 document that he, in fact, cited. You happen
9 to have Dr. Brynjolfsson's testimony up there?

10 A No.

11 MR. SMITH: Why don't we pass that
12 out at the same time. I have marked his
13 amended testimony, Your Honor, Exhibit 140.
14 I don't intend to move it into evidence,
15 because I think it is already testimony
16 effectively, but just to have the document
17 number on it.

18 (WHEREUPON, THE DOCUMENT
19 REFERRED TO WAS MARKED
20 AS SOUNDEXCHANGE EXHIBIT
21 N O . 1 4 0 F O R
22 IDENTIFICATION.)

1 BY MR. SMITH:

2 Q Now, Mr. Lam, referring to the
3 Brynjolfsson amended testimony, first on page
4 3 you see he cites to Exhibit 23 and discusses
5 Live365 data.

6 A Correct.

7 Q And that includes reference to
8 projections as well as actual data?

9 A Yes.

10 Q And that occurs again on pages 17
11 and 18 of the testimony.

12 A Seventeen and 18 of his testimony?

13 Q Do you want to check that for us
14 as well? Do you see references there to the
15 data in Exhibit 23?

16 A Which one is Exhibit 23?

17 Q The one I handed to you. Yes. Do
18 you see on the top where it says Exhibit 23?

19 A I was looking at the bottom.
20 Okay.

21 Q Do you see those references?

22 A Which references?

1 Q On the bottom of page 17 and the
2 top of page 18. Do you see them?

3 A Yes.

4 Q Okay. Let me ask you to turn then
5 to Exhibit 23 itself. That is a document that
6 was --

7 A Okay.

8 Q That's a document that was
9 generated at Live365. Right?

10 A Correct.

11 Q And it was generated on December
12 27, 2005. Do you see the date at the bottom
13 there?

14 A Yes.

15 Q And it is a summary of economic
16 performance as well as projections. Correct?

17 A Correct.

18 Q And if you look at the tables,
19 basically the columns to the left of center
20 are actual performance, and the columns to the
21 right of center are projections.

22 A Correct.

1 Q I wonder if you could point to
2 where it is that you say Dr. Brynjolfsson
3 treated the projections as if they were actual
4 data?

5 A The way that I saw the
6 phraseology, if you look at the -- You know,
7 if you look at that -- Let's say page 17.

8 Q Yes.

9 A Dr. Brynjolfsson says that
10 projections through September 2008 when in
11 many respects Live365 projections are
12 extremely conservative. For example, they
13 project only a modest increase in advertising
14 revenue for 2006, even though by early
15 February 2006 Live365 already sold more in-
16 stream advertising than it did for the entire
17 year of 2005.

18 I'd like to point out that, as I
19 mentioned earlier, advertising previously was
20 sold in-house. We had begun only to use
21 outside agencies sometime in 2005. Okay? So
22 the number that you see in our projection

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1 there, you know, for 2006 -- right? -- we
2 projected 1.5 mil. Right? And then it says
3 that, you know, that by February 2006 we
4 already had sold more, but as I pointed out
5 earlier, that gross number is very, very
6 misleading; because we are actually -- The
7 revenue that we are generating from using
8 outside agency net to us is only about half of
9 that gross number.

10 MR. SMITH: Your Honor, I would
11 object and move to strike that answer.

12 CHIEF JUDGE SLEDGE: Motion to
13 strike is granted.

14 BY MR. SMITH:

15 Q Is there anywhere in this
16 document, Mr. Lam, where Dr. Brynjolfsson
17 treated projections as if they were actual
18 data?

19 A We project only -- There is a
20 mentioning of project only 18 percent increase
21 in revenue per listening hour from 2005 to
22 2008. That projection represents a market

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1 slowing and growing rate. Okay? So he talks
2 of projection there.

3 Q Does he ever say that -- treat the
4 projections as if they were actuals and try to
5 mislead the Board in some way?

6 A Well, that's the way I read it.

7 MR. STEINTHAL: Objection, Your
8 Honor. There is no reference in his testimony
9 that the Board was thought to be mislead with
10 respect to the projections as distinguished
11 from irrelevant revenues and other issues.

12 CHIEF JUDGE SLEDGE: Overruled.

13 BY MR. SMITH:

14 Q Can you answer the question?

15 A Could you reask the question? I'm
16 sorry.

17 Q Is there any place in which Dr.
18 Brynjolfsson tried to mislead the Board by
19 suggesting that projections were actual data?

20 MR. STEINTHAL: Your Honor, again
21 how does he know what Mr. Brynjolfsson tried
22 to do as opposed to what the testimony of

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1 Professor Brynjolfsson is?

2 CHIEF JUDGE SLEDGE: Mr.
3 Steinthal, he has characterized Dr.
4 Brynjolfsson's testimony exactly as Mr. Smith
5 has asked, and he is asking him to defend his
6 characterization, his testimony. Your
7 objection is overruled.

8 MR. STEINTHAL: All right.

9 BY MR. SMITH:

10 Q Is the answer that you can't
11 identify any place in Dr. Brynjolfsson's
12 testimony that he ever mischaracterized the
13 projections as if they were actual data?

14 A Well, the way I read it, based on
15 the document at page 3, you know, and together
16 with 17, when I read the thing in totality, it
17 came across to me as that, you know, he is
18 relying on the projection in addition to the
19 actuals.

20 Q These are projections, by the way.
21 These are projections that you personally
22 prepared. Correct?

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1 A Well, our senior accountant did.

2 Q And did you participate in that
3 process?

4 A Yes, I did.

5 Q And at the time, you thought they
6 were the best projections that you could come
7 up with of the future performance of the
8 company?

9 A Yes.

10 Q And do you have any problem with
11 Dr. Brynjolfsson merely stating that the
12 projections that you produced were consistent
13 with his prior analysis?

14 A Excuse me. Could you repeat the
15 question?

16 Q Do you have some problem with Dr.
17 Brynjolfsson saying that your projections are
18 consistent with his prior analysis?

19 A Do I have any problem?

20 Q With Dr. Brynjolfsson testifying
21 that your own projections are consistent with
22 his prior analysis?

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1 A I'm sorry. I just came from the
2 West Coast, and I'm still trying to wake up a
3 little bit.

4 Could you reask that question one
5 more time?

6 Q Do you have a problem with Dr.
7 Brynjolfsson testifying that your own
8 projections are consistent with his prior
9 economic analysis?

10 A You know, his prior economic
11 analysis, as I read it, he had a very
12 elaborate economic model and which I didn't
13 review for this testimony, but I think -- You
14 know, I think -- What I am saying is, when he
15 gets into characterizing whatever we produce
16 as, you know, experiencing a very high
17 compounded growth, I really have serious
18 problem with that.

19 Q That is not the issue I am asking
20 you about. That's the next issue we are going
21 to get to.

22 A Okay.

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1 Q Now the question I asked you is do
2 you have a problem with him really saying that
3 your projections support his prior analysis?

4 A His prior analysis, meaning his
5 model one, model two? Which one is it?

6 Q Both.

7 A I would have to actually take a
8 look at model one and model two to see that,
9 in fact, is -- because I really don't recall
10 those models that was performed. It's quite
11 a while ago.

12 Q Now referring back to Exhibit 23,
13 these projections that you produced back in
14 December of '05 -- they are projecting a point
15 at which you will reach the break even point.
16 Do you see that in the third line from the
17 bottom?

18 A Yes.

19 Q And the projection that you
20 produced then shows that you would go from a
21 negative cash flow to a positive cash flow
22 between the '06-07 Fiscal Year and the '07-08

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1 Fiscal Year. Is that correct?

2 A Let me -- Are you talking about --

3 Q I was referring to the line EBITDA
4 break even point.

5 A EBITDA, yes.

6 (Whereupon, at 11:49 a.m., the
7 foregoing matter went into closed session, and
8 went back on the record at 11:52 a.m.)

9 Q And that was because of some
10 unusual circumstances in September?

11 A Yes.

12 Q And you anticipate that you will
13 be in the positive thereafter?

14 A No. Let me explain to you why
15 that occurred also. We have had -- Okay, we
16 have a case of fairly substantial turnover in
17 our personnel. In fact, Mr. Porter who
18 testified here chose to leave the company. It
19 was a senior manager who left the company that
20 we have not replaced. Okay?

21 So those individuals represent a
22 substantial part of -- in terms of expense.

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1 So you can see, if you were to look at -- As
2 we get bigger, instead of bringing in more
3 people as an ordinary business would do, in
4 order to survive what we did was we tried to
5 hold out as long as possible. In fact, in the
6 case where we felt that we could not, and
7 tried to recruit people, we made offers to
8 perspective candidates, even the salaries we
9 offer we could not recruit people at the rate
10 that we are offering.

11 CHIEF JUDGE SLEDGE: Mr. Lam, you
12 gave an explanation, but you did not answer
13 the question.

14 THE WITNESS: Okay. So he asked
15 about extraordinary -- are there circumstances
16 in which, while we have seen better financial
17 performance.

18 CHIEF JUDGE SLEDGE: Dr. Lam, he
19 asked you if you broke even in November '05.

20 MR. STEINTHAL: Your Honor, I
21 believe the last question involved
22 specifically an extraordinary event in

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1 relation to November '06, and I think the
2 witness is simply trying to explain what the
3 extraordinary events were.

4 CHIEF JUDGE SLEDGE: But he never
5 answered the question.

6 MR. STEINTHAL: I think he is
7 trying to.

8 CHIEF JUDGE SLEDGE: He gave an
9 explanation, but he never answered the
10 question.

11 MR. STEINTHAL: Okay.

12 THE WITNESS: I am sorry. How
13 would you want me to answer the question?

14 BY MR. SMITH:

15 Q Why don't we withdraw whatever the
16 last question was, and we will start over and
17 make it better.

18 Just so it's clear, you were in
19 the positive on cash flow every month from
20 November of '05 until September of '06, and
21 then you show a negative result in September
22 of '06. Correct?

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1 A Correct.

2 Q Okay. Now if we look at the --
3 back at Exhibit 23, these projections that you
4 said Dr. Brynjolfsson shouldn't have relied
5 on, for the same time period, the October '05-
6 September '06 Fiscal year, you were at that
7 point projecting a negative performance of
8 well over \$300,000 on cash flow. Correct?

9 A Correct.

10 Q And in fact, the way that Fiscal
11 Year turned out is you were well over
12 \$300,000 in the positive. Correct?

13 A Correct.

14 Q Okay. Now --

15 A Could I suggest something?

16 MR. SMITH: Your Honor, I would
17 suggest that we should wait until there is
18 another question pending.

19 THE WITNESS: Okay.

20 BY MR. SMITH:

21 Q Now let me then turn, if I might,
22 to this issue of the compound annual growth

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1 rate that Dr. Brynjolfsson calculated. Just
2 so it is clear, Mr. Lam, you don't have any
3 quarrel, do you, with the actual calculation
4 that he made, the 42 percent per year annual
5 growth rate? I mean, in terms of its
6 mathematical accuracy.

7 A Based on which page?

8 Q I am referring to your testimony
9 about the compound annual growth rate that he
10 calculated, and asking you whether or not your
11 criticism involves some concern about his
12 mathematics as opposed to something else.

13 MR. STEINTHAL: You just referred
14 to Professor Brynjolfsson's calculations. So
15 if we can just the paragraph of his testimony
16 that it focuses on.

17 BY MR. SMITH:

18 Q I believe the issue of compound
19 annual growth rates comes up a couple of
20 different places, Mr. Lam. Maybe you could
21 help us find it, since you have testified
22 about it.

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1 One place is on the top of page 4
2 in Dr. Brynjolfsson's testimony, Exhibit 140.
3 Correct? Do you see that, where the growth
4 rate of 42 percent a year comes up?

5 A Approximately which line? Page 4,
6 correct, in my rebuttal?

7 Q Fifth line. No, no. I'm asking
8 you to look at Dr. Brynjolfsson, just trying
9 to find out where it is he makes these
10 statements that you are critical of. One is
11 on the top of page 4. Do you see that, 42
12 percent?

13 A Yes.

14 Q And another one is on the bottom
15 of page 17 where he refers to an overall
16 growth rate of 186 percent for a period of
17 several years. Do you see that?

18 A Yes.

19 Q Are you testifying today that
20 there is some inaccuracy with the calculations
21 that we just referred to?

22 A I am testifying that --

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1 Q No. I'm asking you whether you
2 are testifying that. Is the answer yes or no?
3 You can answer that yes or no.

4 MR. STEINTHAL: If he could answer
5 the question without being cut off, I think
6 that would be fair.

7 CHIEF JUDGE SLEDGE: Please answer
8 the question, whether that is what you are
9 testifying.

10 THE WITNESS: What I am
11 testifying, to whether this number is accurate
12 or not.

13 BY MR. SMITH:

14 Q Are you saying it is inaccurate?

15 A It is inaccurate in the sense that
16 it is based on a very small base.

17 Q I am trying to differentiate
18 between two things. It seems like this should
19 be simple. Are you saying there is something
20 wrong with the way that he did the calculation
21 or that there is something wrong with the way
22 he applied the calculation?

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1 MR. STEINTHAL: He just said it
2 was accurate.

3 MR. SMITH: I didn't hear it that
4 way.

5 CHIEF JUDGE SLEDGE: You heard
6 something different than I heard.

7 THE WITNESS: No, no, it's
8 accurate, but it is based on a very small
9 base.

10 MR. STEINTHAL: right.

11 BY MR. SMITH:

12 Q I appreciate that clarification.
13 I didn't understand it.

14 Now can you tell me, is there
15 anywhere in Dr. Brynjolfsson's testimony where
16 he says that that growth rate -- that he
17 assumes that that growth rate will continue in
18 the future?

19 A I don't remember whether anywhere
20 in his testimony he did or he didn't.

21 Q Do you think that is an important
22 thing in deciding that his calculation of that

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1 growth rate is misleading?

2 A Well, in a sense -- In a real
3 sense, it is, because he is trying to
4 characterize us as a company that is growing
5 at a tremendous rate, where we didn't have
6 enough revenue to pay for the expenses.

7 Q By the way, just for
8 clarification, the growth rate that we are
9 talking about here is not a growth rate in
10 revenues. It is a growth rate in revenues per
11 listener hour. Correct?

12 MR. STEINTHAL: Are we referring
13 to paragraph 4 or paragraph 17?

14 MR. SMITH: You mean page 4?

15 MR. STEINTHAL: Page 4 or page 17
16 of Professor Brynjolfsson?

17 MR. SMITH: I was referring to
18 both.

19 BY MR. SMITH:

20 Q Do you recall the question?

21 A Could you reask the question?

22 Q The growth rate that we are

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1 talking about here is the growth rate not of
2 revenues per se, but of revenues per hour, per
3 listener hour. Is that right?

4 A I believe so, yes.

5 Q Okay. Now in fact, all that Dr.
6 Brynjolfsson says, referring to the bottom of
7 page 17, is that the projected 18 percent
8 increased growth rate seems conservative in
9 light of the past when the growth rate was 186
10 percent over a period of years. Is that
11 right?

12 A Yes.

13 Q And you find that deceptive in
14 some way?

15 A I have real issues with it.

16 Q Okay. Now let me ask you then, if
17 I might, a little bit about this notion that
18 there is a category of revenue that you think
19 is irrelevant to these proceedings, and that
20 is the revenue that you receive from the
21 people who come to you to webcast essentially.

22 Now if one was trying to decide

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1 whether the economic situation of Live365 was
2 such that it had the economic ability to pay
3 royalties at a given level, why wouldn't you
4 want to take into account all forms of revenue
5 that you have available to you?

6 A Because the only way to scale a
7 business is where, you know, the users pay for
8 it -- okay? -- the users meaning the listeners
9 who enjoy the music. In the rest of the
10 world, you know, people pay for content, and
11 now -- You know, people had to pay for
12 content, witness Sirius, XM. Everybody pays
13 for content. Okay?

14 The reason we are able to derive
15 that revenue at all -- I won't even call it
16 income per se -- is because of the fact that
17 we have spent so much money. We have invested
18 so much money in the infrastructure that, you
19 know, I think it would not be -- You know, I
20 think it would be very appropriate to say that
21 we actually -- every dollar we invest, we are
22 losing money big time. We have tried to

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1 recoup some of the cost we have put into it.

2 Q Well, to return to the subject we
3 were talking about, Mr. Lam, essentially
4 you've found a way to get third parties to do
5 a lot of the programming for you in your
6 webcasting service, and then to get them to
7 pay you money for the opportunity to do the
8 programming. Isn't that right?

9 A I think it is an act of
10 desperation. I don't think that's scalable.
11 We already are experiencing actually decline
12 in that as well. On our CB consumer
13 broadcasting, we had hit a limit of roughly
14 6,000 people that pay, and it has not been
15 increasing. In fact, it has been decreasing.

16 Q But it is still a substantial
17 chunk of the revenue that you receive?

18 A It is consumer and professional,
19 yes, it's about 45 percent, but that is the
20 only way that we could survive.

21 Q And in trying to decide what your
22 real economic circumstances are, that is one

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1 of the things you would want to take into
2 account. Correct?

3 A As I said, if we want to grow as a
4 company, and in order to recoup the investment
5 we have made, that is not a sustainable model.

6 Q Now Dr. Brynjolfsson in his
7 amended testimony, if you have it in front of
8 you, page 3, Footnote 1, actually anticipated,
9 did he not, the possibility that one might
10 want to look at the other categories of
11 revenue and exclude the broadcaster fees. Do
12 you see that?

13 A Could you point it out?

14 Q It is in Footnote 1.

15 A Do you see that?

16 A Yes. Okay, let me read it.

17 Q Take your time.

18 A Okay.

19 Q Okay, now what he says there, Mr.
20 Lam, is "I have included the revenues from
21 these other sources in this analysis, as it is
22 unclear which costs should be separately

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1 attributed to these broadcasting services."

2 Do you see that?

3 A Yes.

4 Q So one of the things you would
5 agree, wouldn't you, if you are going to
6 exclude a category of revenue, you also have
7 to exclude some category of cost to decide
8 whether the remaining parts of the business
9 are profitable or not? Do you agree with
10 that?

11 A It's hard to say. It is not
12 necessarily a correlation.

13 Q There is not necessarily any
14 correlation between those revenues and --

15 A Yes. It depends on the situation,
16 really.

17 Q Well, certainly, one of the things
18 we know is that all of your financial
19 documents basically put all the revenues
20 together and all the costs together. For
21 example, Exhibit 23?

22 A Correct.

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1 Q Or Exhibit 141, the month by month
2 one.

3 A Correct.

4 Q Certainly, those documents
5 wouldn't give anybody a way to separate out
6 costs attributable to the broadcasting fees
7 from costs attributable to the advertising
8 revenue or the subscription listener revenue.
9 Correct?

10 A Correct.

11 Q So what Dr. Brynjolfsson said in
12 that circumstance is, well, I'll leave all the
13 costs in, and I will leave all the revenues
14 in, and we will look at how the company
15 performs, because that's the way the company
16 reports its performance. Correct?

17 A Correct. At this point in time,
18 correct.

19 MR. SMITH: Your Honor, at this
20 point I would like to move into evidence
21 Exhibit 141, which is the month by month
22 revenue trend document.

1 MR. STEINTHAL: Your Honor, I have
2 no objection to the document coming in. It
3 does remind me of what I was going to ask
4 before, which is both this document and the
5 testimony concerning this document and Exhibit
6 23DR, SoundExchange Exhibit 23DR which
7 contains all the columns of actual and
8 projected revenues, the information about the
9 actual and projected revenues is clearly
10 restricted information. It has been
11 designated as such. It is not public
12 information. I would move that the documents
13 themselves and the testimony concerning them
14 insofar as it relates to figures should be
15 treated under the protective order.

16 CHIEF JUDGE SLEDGE: Without
17 objection, Exhibit 141 is admitted.

18 (WHEREUPON, THE DOCUMENT
19 REFERRED TO, PREVIOUSLY
20 MARKED AS SOUNDEXCHANGE
21 EXHIBIT NO. 141 FOR
22 IDENTIFICATION, WAS

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RECEIVED INTO EVIDENCE.)

CHIEF JUDGE SLEDGE: Any objection to applying the protective order to Exhibit 141?

MR. SMITH: No, Your Honor.

CHIEF JUDGE SLEDGE: Without objection, the protective order applies to Exhibit 141.

MR. STEINTHAL: Your Honor, there is the additional issue of the testimony pertaining to these two documents.

CHIEF JUDGE SLEDGE: We are only dealing with Exhibit 141.

MR. STEINTHAL: Well, we had previously been asking -- Mr. Smith had asked questions about SoundExchange Exhibit 23DR.

CHIEF JUDGE SLEDGE: Those comments are premature at this point.

MR. STEINTHAL; Well, it is already in, Your Honor. It was attached to Professor Brynjolfsson's report, which is restricted. So my only application at this

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1 point is in respect of the questions and
2 answers that reveal the content of these
3 restricted materials, it would undermine the
4 purpose of the protective order if the
5 testimony concerning Live365's revenues and
6 projections were not deemed to be covered by
7 the protective order as well.

8 CHIEF JUDGE SLEDGE: What question
9 and answer apply to Exhibit 141?

10 MR. STEINTHAL: Your Honor, there
11 was a series of questions where Mr. Smith
12 asked about Live365's showing a profit month
13 to month up until November '06 and questions
14 about whether the speed of that relative to
15 what had been projected -- the whole series of
16 questions and answers about that topic and the
17 actual numbers that are reported on Exhibit
18 141.

19 CHIEF JUDGE SLEDGE: Mr.
20 Steinthal, why didn't you raise your concern
21 with the questions being asked, and the answer
22 on them?

1 MR. STEINTHAL: I am somewhat
2 delayed in standing to make the motion, Your
3 Honor. Once things got started, I didn't want
4 to interrupt the questioning about the
5 document, and once Mr. Smith put it into
6 evidence, I figured I would raise it as to the
7 document and the questions pertaining to it.

8 CHIEF JUDGE SLEDGE: Any objection
9 to applying the protective order to the
10 questions relating to the breaking even in
11 November '05 and remaining in a positive cash
12 flow until September '06?

13 MR. SMITH: I have no objection in
14 principle, Your Honor. It makes it a little
15 difficult, I think, for the record if we don't
16 have something more specific for the court
17 reporter, among others, to know what questions
18 we are really talking about.

19 CHIEF JUDGE SLEDGE: Because of
20 that lack of specificity, that's the only part
21 to which this motion has been applied.
22 Without objection, that motion is granted.

1 BY MR. SMITH:

2 Q Now let me turn to another topic,
3 Mr. Lam, which is the issue of Dr.
4 Brynjolfsson's discussion of advertising
5 revenue. On the top of page 4 of your
6 testimony you accuse him of grossly
7 mischaracterizing the nature of Live365's
8 advertising revenue. Do you see that, seven
9 lines down? In your testimony, seven lines
10 down.

11 A It says that, yes.

12 Q Okay. Now that is because you say
13 he failed to take into account the commissions
14 that are paid to the ad rep firms like Ronning
15 Lipset that sell the ads?

16 A Correct.

17 Q And now turning to Dr.
18 Brynjolfsson's written amended testimony, page
19 8, middle of the page, what Dr. Brynjolfsson
20 did is he specifically said that you had
21 started using an ad rep from Ronning Lipset.
22 Correct?

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1 A Correct.

2 Q And the statement that he made
3 there, which is that in the fourth quarter of
4 2005 alone Ronning Lipset sold more than
5 double the amount that Live365 had sold in the
6 entire 13 months prior to hiring Ronning
7 Lipset Radio. Do you see that statement?

8 A Correct.

9 Q That statement is factually
10 correct, is it not?

11 A I believe so. I don't have all
12 the documents here to do the calculation. So
13 I believe so.

14 Q Now one of the things that Dr.
15 Brynjolfsson attached to this testimony was
16 Exhibit 32, already in evidence. Have you got
17 that there, Mr. Lam?

18 A Yes.

19 Q This is another one of these
20 monthly revenue trend documents.

21 A Yes.

22 MR. STEINTHAL: Your Honor, if I

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1 may, this is another restricted document in
2 evidence, and to avoid the situation from
3 before, if there are going to be questions and
4 answers about the actual contents of the
5 document, I would move that this portion of
6 the transcript be restricted.

7 MR. SMITH: Your Honor, until the
8 question is asked, I don't think it is
9 appropriate, and I wasn't intending to ask
10 anything about a number.

11 CHIEF JUDGE SLEDGE: We will wait
12 to see.

13 BY MR. SMITH:

14 Q Now one of the things that these
15 monthly trend documents show, Mr. Lam, is the
16 amount of money that is paid to ad rep firms
17 for commissions. Correct?

18 A Correct.

19 Q And that shows about ten lines
20 from the bottom where it says RLR/VCM COMMS.

21 A Correct.

22 Q Is that right? That's the

1 commissions?

2 A Correct.

3 Q And so this document attached to
4 Dr. Brynjolfsson's testimony specifically
5 disclosed the precise amount of commissions
6 that were being paid in each month to the ad
7 rep firms. is that right?

8 A I think the point he was going to
9 make here -- I don't know whether it is or it
10 isn't, but the point he is making there is
11 that we quickly were able to increase ad
12 sales.

13 Q And the answer to my question is?

14 A Is yes and no, because as I said
15 earlier that we have to basically turn over
16 half of whatever increase that we get.

17 Q And in fact, exactly what you had
18 to turn over was revealed in Exhibit 32.
19 Correct?

20 A Excuse me?

21 Q Exactly what you had to turn over
22 was revealed in Exhibit 32. Is that correct?

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1 A I don't know whether it's exactly
2 or not, because it is -- You know, I mean,
3 reading -- You are asking me to read in
4 between the lines, I believe.

5 Q I'm asking you --

6 A All he said was an in-stream --
7 all the advertising revenue quickly increased.

8 Q Yes, but I'm asking about the
9 contents of this document, Exhibit 32. This
10 tells you precisely what the commissions were,
11 does it not?

12 MR. STEINTHAL: The witness is
13 looking at the testimony of Brynjolfsson. So
14 let's just make sure the question and answer
15 relate to each other. If the question is
16 about Exhibit --

17 THE WITNESS: Give me a second.
18 Give me a second.

19 MR. STEINTHAL: You're on the
20 wrong document.

21 BY MR. SMITH:

22 Q The only question I am asking at

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1 this point is: Does Exhibit 32, not the thing
2 you are looking at but Exhibit 32, reveal the
3 precise amount of commissions that were paid
4 during this time period by Live365 for the
5 ads?

6 A It's the amount of commissions
7 that we have paid. Whether it is precise or
8 not, because sometimes there are
9 miscalculations and all that. I think, by and
10 large, substantially yes.

11 Q Okay, thank you.

12 A And sometimes we also have bad
13 debts. We are responsible for our own bad
14 debts. In fact --

15 Q Say that again, Mr. Lam. I'm
16 sorry, I didn't hear you.

17 A There are bad debts, b-a-d d-e-b-
18 t-s. Okay, in fact, we have substantial
19 amount of outstanding -- I mean accounts that
20 have been over 90 days incurred by RLR.

21 Q So by putting the commissions on
22 this Exhibit 32 or on the other revenue trend

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1 document that we looked at, Exhibit 141, what
2 that does is it actually factors that right
3 into the bottom line calculations about your
4 cash flow, does it not, the EBITDA line?

5 A Actually, we -- If you are talking
6 about cash flow, we've got -- Since you asked
7 the question of cash flow --

8 Q Mr. Lam, would you answer my
9 question, please?

10 A Yes, I am answering your question,
11 please, Mr. Smith. I'm trying to explain this
12 to you like a businessperson should.

13 As I said earlier, oftentimes the
14 RLR accounts we cannot collect for over 90
15 days, sometimes 120 days, sometimes longer
16 than that. So you are asking the question
17 about cash flow. Actually, we booked this
18 before we even received the cash, and we had
19 to back them out later on.

20 Q What this document does is it
21 shows cash in and cash out month by month, and
22 one form of cash out is the commissions.

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1 Correct?

2 A Correct. But cash in is also --
3 Our cash in actually may look like they are
4 bigger, because we have long term
5 subscriptions, and those, you know, we would
6 collect. For example, for one-year
7 subscription we accrued them on a monthly
8 basis, but we would take the money up front.

9 Q Now you gave some testimony about
10 this term narrow casting. Is that something
11 that you think is a mischaracterization of
12 what you do?

13 A I think we are getting into
14 semantics here. I think, in a form, yes, we
15 are narrow casting. I mean, for the people
16 there I think very few people who listen
17 that's narrow casting. Right?

18 Q That's a description you used of
19 your own business, isn't it?

20 A We also have stations where we
21 actually have more people listening as well.

22 Q My question is the term narrow

1 casting. You used it yourselves to refer to
2 your own business, have you not?

3 A Yes, I believe previously, yes, we
4 have referred to that.

5 Q Handing out what has been marked
6 as Exhibit 142. Do you recognize this
7 document, Mr. Lam?

8 A Yes.

9 (WHEREUPON, THE DOCUMENT
10 REFERRED TO WAS MARKED
11 AS SOUNDEXCHANGE EXHIBIT
12 N O . 1 4 2 F O R
13 IDENTIFICATION.

14 Q This is a presentation that was
15 made by Live 365 in an effort to sell
16 advertising?

17 A Correct.

18 Q And if you refer to page 3 of the
19 document, Exhibit 142, you see the use of the
20 word narrow cast. Do you see that?

21 A Yes.

22 Q So in fact, in trying to sell

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1 advertising, what you tell the world is that
2 what makes Live 365 different from other
3 webcasters is that you have -- that you narrow
4 cast. Correct?

5 A Right.

6 Q Now I want to ask you a couple of
7 questions about your Exhibit 1 that you
8 attached to your testimony. Now is the
9 purpose of this exhibit to suggest that
10 somehow you are like terrestrial radio?

11 A Give me a second.

12 Q Sure.

13 A Okay. Will you please reask your
14 question?

15 Q Is the purpose of this analysis to
16 show that you, Live365, are like terrestrial
17 radio in the way you actually operate?

18 A Not exactly. What we support is
19 to support the statement that actually a
20 certain percentage of our stations get only --
21 I mean, that our listeners, a certain
22 percentage listen to only one station, certain

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1 percentage listen to two, and so on and so
2 forth.

3 Q But you wouldn't suggest that this
4 analysis in any way undercuts the idea that
5 your listeners listen to very narrow niche
6 kinds of stations. Right?

7 A It really depends. But you know,
8 they listen to -- What we are saying is they
9 listen to -- Oftentimes after they come to us,
10 they would listen to limited number of
11 stations.

12 Q Right, but those stations might be
13 very narrow and esoteric stations. There are
14 just not very many of them in each case for
15 most users. Right?

16 A Narrow in what sense?

17 Q Somebody might listen just to
18 Spanish classical guitar stations, but there
19 might just be one or two. Correct?

20 A In terms of stations or of the
21 persons?

22 Q The person might listen to very

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1 few stations, but they might still be narrow
2 niche stations. Is that correct?

3 A Yes.

4 Q Okay. And you have no analysis
5 that suggests that there isn't a lot of
6 listening on your service to very narrow niche
7 stations. Right?

8 A I believe here the data says that
9 we -- A certain percentage of people listen to
10 -- listeners, right? they listen to just one
11 station, and there are certain people who
12 listen to two.

13 Q But it doesn't tell you anything
14 about what stations they are listening to.

15 A No, it doesn't.

16 Q Okay. Now in fact, it is not
17 true, is it, that your listeners focus on a
18 very small number of stations. They listen to
19 a huge range of stations, don't they?

20 A They have the opportunity to.

21 Q And have you done an analysis of
22 whether they actually do that?

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1 A In fact, we are in the process of
2 trying to look into that. I don't think that
3 was previously done in a very scientific
4 method. You know, we have certain hypotheses,
5 but we now are looking at, you know, how we
6 could up our conversions by analyzing such
7 things.

8 Q Well, do you recall making a study
9 of how many different stations are listened to
10 on Live365 in a given month?

11 A Yes. I think we were -- During
12 the proceeding, we were asked certain
13 questions, and our attorneys asked us to pull
14 certain information, I believe.

15 Q Now referring, Mr. Lam, to what I
16 have marked as Exhibit 143, this is a document
17 produced at Live365?

18 A Would you please give me a second?

19 I believe so, but I personally
20 actually did not come across this before.
21 Maybe Mr. David Porter had this prepared
22 before.

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1 (WHEREUPON, THE DOCUMENT
2 REFERRED TO WAS MARKED
3 AS SOUNDEXCHANGE EXHIBIT
4 N O . 1 4 3 F O R
5 IDENTIFICATION.)

6 Q Okay. Well, you haven't seen this
7 document. Are you familiar with the fact that
8 there was a study done of how many different
9 stations are looked at or listened to in each
10 month?

11 A Not this one specifically, but I -
12 - You know, I know different information were
13 pulled during the CRB.

14 Q Is it a fact that thousands of
15 different stations are listened to by your
16 listeners every single month?

17 A Yes, by many listeners.

18 Q Right. And so they are listening
19 to very, very narrow niche specialized
20 stations as well as more mainstream stations
21 every month. Correct?

22 A I would assume so, yes.

1 MR. SMITH: Excuse me, if I might,
2 just a moment.

3 Nothing further, Your Honor.

4 CHIEF JUDGE SLEDGE: Mr. Smith, I
5 don't understand what point you are trying to
6 make with that last question. I guess, since
7 this -- one of the goals of the testimony, it
8 is appropriate for me to ask you that.

9 MR. SMITH: Sir, I was referring
10 Your Honor to pages 4 and 5 of Mr. Lam's
11 written testimony in which he was responding
12 to the concern raised by our witnesses that,
13 because of the narrowness and the niche nature
14 of the stations, they would be much more
15 likely to substitute for purchases of CDs,
16 because people could find precisely what they
17 wanted even to their specific taste; and to
18 the notion that somehow his Exhibit 1, which
19 shows that most listeners only listen to a
20 very few stations, doesn't in any way undercut
21 the idea that people could go out and find
22 very niche stations that are specifically

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1 tuned to their particular taste, that would --

2 CHIEF JUDGE SLEDGE: and I
3 understand that. But what is the relevance
4 then of the high number of stations per month
5 that attracts listeners?

6 MR. SMITH: The relevance would be
7 that it is not as if everybody is listening to
8 one mainstream station. They are listening to
9 all the niche stations that are available on
10 that service. That is a more relevant figure,
11 I would submit, than the figure he has put in
12 evidence.

13 CHIEF JUDGE SLEDGE: Oh, it took
14 me a while to figure it out. So I'm glad I
15 asked the question.

16 MR. SMITH: Thank you for the
17 opportunity.

18 JUDGE ROBERTS: While we are on
19 that topic, Mr. Lam, why has the number of
20 stations decreased so dramatically after July
21 of 2002?

22 THE WITNESS: Yes. Initially, I

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1 think we start charging broadcasters for using
2 our platform. At one point in time, in fact,
3 we even had more number than this, a higher
4 number than this. So as we start to charge
5 people, there are defections of stations and
6 that kind of stuff.

7 JUDGE ROBERTS: Thank you.

8 THE WITNESS: That's why I
9 mentioned earlier that it is not a sustainable
10 model, in the long run, because everybody is -
11 -

12 JUDGE ROBERTS: You answered my
13 question. Thank you.

14 CHIEF JUDGE SLEDGE: Mr.
15 Steinthal?

16 MR. STEINTHAL: Yes, a few
17 questions.

18 REDIRECT EXAMINATION

19 BY MR. STEINTHAL:

20 Q Mr. Lam, first of all, take a look
21 at Paragraph 2 of your written witness
22 statement. Mr. Smith asked you some questions

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1 about where you accused Dr. Brynjolfsson of
2 grossly mischaracterizing things, and he asked
3 you that question in specific reference to
4 projections and whether the projections that
5 were given were accurate or not.

6 Is there anything in Paragraph 2,
7 and in particular the sentence that Mr. Smith
8 quoted at the bottom of page 1, going onto
9 page 2, that accuses Mr. -- or Professor
10 Brynjolfsson of having grossly
11 mischaracterized the projections information?

12 A Could you reask that question?

13 Q I'm asking you whether, in fact,
14 as Mr. Smith suggested you did, did you
15 actually suggest that Professor Brynjolfsson
16 grossly mischaracterized the projections data
17 as opposed to other information?

18 A No, I think I said data,
19 misinterprets Live365's data.

20 Q You never accused him of
21 mischaracterizing the actual projections
22 information. Right?

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1 A No.

2 CHIEF JUDGE SLEDGE: I'm sorry,
3 Mr. Steinthal. Read that next sentence.

4 MR. STEINTHAL: And there is
5 nothing in there, Your Honor, that accuses him
6 of grossly mischaracterizing the information.
7 The grossly mischaracterizing quote is from
8 the prior sentence. It does not relate to the
9 projections.

10 CHIEF JUDGE SLEDGE: And this
11 sentence begins saying "more specifically."

12 MR. STEINTHAL: And all he says
13 about the revenues -- the projections, is that
14 the projected revenues are treated as if they
15 were actuals.

16 CHIEF JUDGE SLEDGE: And that was
17 the point of a lot of Mr. Smith's questions.

18 BY MR. STEINTHAL:

19 Q Well, let me ask you to take a
20 look at Professor Brynjolfsson's statement,
21 sir. Take a look at page 4, if you will. Is
22 this one of the places in the chart on page 4

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1 where Professor Brynjolfsson is setting forth
2 projections data as part of his presentation?

3 A Page 4? Okay, what do you want me
4 to look at?

5 Q Just Table 1.

6 A Table 1. Okay.

7 Q Is this a place where you felt he
8 was using the projections information in
9 connection with the setting forth of data?

10 A Yes, because he would have to
11 necessarily use the projected Fiscal Year
12 2006-7-8 to arrive at any kind of conclusion
13 or do an analysis.

14 Q Mr. Smith asked you a bunch of
15 questions about break even, and you mentioned
16 in response to one of the questions cap ex and
17 EBITDA, E-B-I-T-D-A.

18 Can you tell the Board what the
19 impact would be, were you to include in an
20 assessment of the financial circumstances of
21 Live365 what you referred to on the financial
22 documents as cap ex?

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1 A Cap ex is capital expenditure. So
2 should I explain the concept of EBITDA? I
3 don't want to insult anybody here. It's
4 earning before interest, tax, depreciation and
5 amortization. Okay?

6 Usually, with high tech equipment
7 there is a three-year life depreciation time
8 period. So, for example, if we buy a million
9 dollars worth of equipment, we would have to
10 fully depreciate it in three years, because
11 chances are, by the time three years comes
12 around, they are no longer any good.

13 So that's why I put cap ex in
14 there. Remember, this is preserver
15 projection, and we -- instead of using
16 depreciation reflected, we actually charge,
17 say, how much money have we spent, and we are
18 likely to spend -- in fact, last year we spent
19 more money than we projected in cap ex.

20 Q And my question is whether, if you
21 include the costs associated with capital
22 expenditure in an analysis of how you are

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1 doing financially, does that have an effect on
2 what you would say the company is doing in
3 terms of how successful it has been?

4 A Could you reask that question?

5 Q Yes. I'm asking what the effect
6 is of taking into consideration your cap ex
7 costs when looking at the financial condition
8 of the company.

9 A Yes, it would impact it quite
10 substantially.

11 Q In what respect?

12 A For example, -- You know, as you
13 know, if you look at this Exhibit -- what is
14 it, 23? -- you notice --

15 MR. STEINTHAL: Before you do
16 that, I would move that any testimony you give
17 that you consider to be confidential as to
18 Exhibit 23, which is already in evidence on a
19 restricted basis, be treated as subject to the
20 protective order, Your Honor.

21 CHIEF JUDGE SLEDGE: Any
22 objection to applying the protective order to

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1 his testimony from reference to Exhibit 23?

2 MR. SMITH: The motion as phrased,
3 Your Honor, was any testimony that Mr. Lam
4 considers confidential. I think that is
5 probably not the right standard.

6 CHIEF JUDGE SLEDGE: That's not
7 the way I phrased it.

8 MR. SMITH: So that anything he is
9 going to say now would be covered by the
10 protective order?

11 CHIEF JUDGE SLEDGE: Anything
12 referencing Exhibit 23 is the motion.

13 MR. SMITH: No objection, Your
14 Honor.

15 CHIEF JUDGE SLEDGE: Without
16 objection, the testimony derived from
17 referencing to Exhibit 23 is granted.

18 THE WITNESS: To make sure that we
19 have the flow, could you ask the question
20 again?

21 BY MR. STEINTHAL:

22 Q I think the question was what the

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1 impact would be in assessing the financial
2 condition of the Live365, were you to take
3 into consideration the cap ex costs?

4 A Okay. Once we take the cap ex
5 into consideration, you know, Mr. Smith's
6 characterization that we would have made money
7 is not accurate. In fact, earlier if we were
8 to look at, for example, go back to Fiscal
9 Year 2002, 2003, you notice that there was
10 very low level of cap ex. That is because the
11 company was losing so much money that no money
12 -- virtually no money was spent on it, because
13 there was no money to spend, and then at that
14 point in time, you know, we tried to do
15 whatever we could.

16 In fact, even the 2004 we spent
17 almost 400,000 in cap ex. That wasn't nearly
18 enough, and 2005 July we had a severe outage,
19 what I call a catastrophic outage. In fact,
20 it could have ended a company's existence.

21 You know, there was a massive
22 problem, because we had deferred replacing the

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1 equipment for too long, because we didn't have
2 the money a few years back, and basically, I
3 think if it weren't for the heroic deeds of
4 some of our employees who basically spent
5 their weekends, weekends after weekends,
6 weeknights without sleeping to try to do
7 everything possible, I don't think Live365
8 could possibly be standing today.

9 Q Just one more question, sir, in
10 relation to Exhibit 143 that you were shown at
11 the end of your direct examination with the
12 number of stations that are accessed at least
13 one time in any given month.

14 Judge Roberts pointed you to July
15 31, 2002, where the number of stations was
16 halved literally from July to August. Do you
17 know whether the decision of the Library of
18 Congress at or about that time with respect to
19 webcasting royalties had anything to do with
20 the decline in the number of stations?

21 A Yes, because the rate actually was
22 higher than we anticipated. In fact, it was

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1 much higher than what we anticipated. So we
2 really, really had to put a hard cap on -- You
3 know, people wanted broadcasts. They
4 necessarily had to pay or else, you know, we
5 did not see that we could live another day.

6 MR. STEINTHAL: I have no further
7 questions, Your Honor.

8 CHIEF JUDGE SLEDGE: Going back to
9 that motion to apply the protective order,
10 there was no testimony referencing Exhibit 23.
11 So it did not apply to any testimony.

12 Mr. Joseph?

13 MR. ASTLE: No questions, sir.

14 CHIEF JUDGE SLEDGE: Mr. Taylor?

15 MR. TAYLOR: No questions, Your
16 Honor.

17 RECROSS EXAMINATION

18 BY MR. SMITH:

19 Q Just a couple of questions, Mr.
20 Lam.

21 A Yes.

22 Q I want to refer you to the table

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1 on page 4 of Dr. Brynjolfsson's amended
2 testimony that Mr. Steinthal asked you to look
3 at.

4 Do you see the columns that are
5 labeled Fiscal Year 2006, 2007 and 2008?

6 A Yes.

7 Q And those have asterisks on them.
8 What does the asterisk mean?

9 A It means estimated.

10 Q And above that in the text, Dr.
11 Brynjolfsson was very clear in differentiating
12 between the actual data for 2002 through 2005
13 and the projections for thereafter, was he
14 not?

15 A Yes. He had said specifically
16 2002 and 2005 Live365 have increased at a
17 compounded annual rate of 42 percent per year.

18 Q And the next paragraph then talks
19 about the projections for after 2005.
20 Correct?

21 A Correct.

22 MR. SMITH: No further questions,

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1 Your Honor.

2 CHIEF JUDGE SLEDGE: Mr.

3 Steinthal?

4 MR. STEINTHAL: No further
5 questions, Your Honor.

6 CHIEF JUDGE SLEDGE: Any questions
7 from the bench for Mr. Lam? Thank you, Mr.
8 Lam. You are excused.

9 CHIEF JUDGE SLEDGE: Mr.
10 Steinthal, from the witness list, can I
11 believe you are not going to use this
12 afternoon for your witnesses?

13 MR. STEINTHAL: That is correct,
14 Your Honor. We will have two witnesses
15 tomorrow, Mr. Fancher in the morning and Mr.
16 Nebel in the afternoon.

17 JUDGE WISNIEWSKI: Mr. Nebel will
18 be available if we finish early with Mr.
19 Fancher?

20 MR. STEINTHAL: What we are trying
21 to do -- Yes, in the morning, and we are
22 checking on the availability of one of the

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1 other witnesses, assuming things go at the
2 same speed we are going right now, and we will
3 do our best.

4 CHIEF JUDGE SLEDGE: It is a shame
5 we are wasting this afternoon.

6 MR. STEINTHAL: I agree, Your
7 Honor, but perhaps it won't be wasted. There
8 are other things that we can be doing
9 constructively for purposes of the panel.

10 MR. LARSON: Your Honor, can I
11 ask: On Wednesday you said you have a meeting
12 from 1:30 to 3:30. Will we also --

13 CHIEF JUDGE SLEDGE: We will break
14 from 1:30 to 3:30.

15 MR. LARSON: And will we also be
16 breaking for lunch at 12:30 to 1:30? So we
17 will lose that chunk as well?

18 CHIEF JUDGE SLEDGE: I guess so.

19 JUDGE WISNIEWSKI: Actually,
20 bringing that up, but you should be reminded
21 that, since that hearing will also occur in
22 this room, if you are concerned about leaving

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1 anything here, you might want to take it with
2 you.

3 MR. STEINTHAL: And might I
4 inquire one more housekeeping issue about the
5 issue of the timing Thanksgiving week. Are
6 you going to require us to submit a motion?
7 I just need to advise the Tribunal in the U.K.
8 as to when, from a timing perspective, I can
9 let them know.

10 CHIEF JUDGE SLEDGE: Yes.

11 MR. STEINTHAL: Okay. So we will
12 need to get something in writing today?

13 CHIEF JUDGE SLEDGE: Yes. With
14 the factors addressed that we have discussed
15 earlier.

16 MR. STEINTHAL: Right. Okay.

17 CHIEF JUDGE SLEDGE: Thank you.
18 Being no other witnesses available for this
19 afternoon, we will recess until 9:30 on
20 Tuesday.

21 (Whereupon, the foregoing matter
22 went off the record at 12:41 p.m.)

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John Mongoven